THE LAW OF SIMONY.

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THE LAW of SIMONY:

Francis Margrave.

CONTAINING,

All the STATUTES, CASES at LARGE, ARGUMENTS, RESOLUTIONS, and JUDGMENTS concerning it,

UNDER THE FOLLOWING HEADS:

CHAP. I. Definition, and Oath of Simony, and by what Authority this Oath is adminiſtered.

CHAP. II. Of Simony, by the Canon and Common Law; the Stat. of 31ſt ELIZ. *c.* 6. concerning it; and the erroneous Opinions of *Lord* HOLT, and ſeveral other Judges, in ſaying that the Word Simony is not in that Act.

CHAP. III. Commentaries and Determinations upon that Act, from *Lord* COKE, and other Reporters

CHAP. IV. Caſes adjudged at Law and in Equity, reſpecting *general* and *ſpecial* Bonds of Reſignation.

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The Whole COLLECTED, DIGESTED, and PUBLISHED

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Miſera eſt Servitus ubi jus eſt VAGUM *aut* INCERTUM.
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ADVERTISEMENT.

TO explain and render the Law concerning Simony better known and more generally underſtood, than it is at preſent, is the Deſign of compiling the following Sheets; which are intended to contain not only all the Caſes cited by the learned Judges, the Right Reverend and learned Prelates, and the noble and learned Lords, who ſpoke in the very important Cauſe of the Biſhop of LONDON and LEWIS DISNEY FFYTCHE, Eſq. but alſo many other Caſes, found in the Reporters and other Authors. The Caſes of the Plaintiff and Defendant in Error, in that great Cauſe, are inſerted at large, accurately and Word for Word as they were printed and delivered to the HOUSE of PEERS: and the Editor has endeavoured to collect and arrange all the Materials of this Treatiſe impartially, and to the beſt of his Judgment and Abilities. How far he has ſucceeded in this Attempt muſt be ſubmitted to every intelligent Reader, who, no doubt, will ſuſpend his Judgment till after Peruſal.

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ERRATA.

In page 17, line 19 from the top, for 9 *Car.* 1. *read* 5 *Car.* 1.——In page 52, line 7 from the top, after Chief Baron *Skynner*, *inſert* Mr. Baron *Perryn*.——In page 44, ſecond line after CHAP. *for the words*—reſignation of a benefice, *read*, reſignation of a perſon preſented to a benefice.

A

CATALOGUE

OF THE

AUTHORITIES

Referred to in the following TREATISE,

With their ſeveral CONTRACTIONS.

A.

Abr. Eq. Ca.——Abridgement of Equity Caſes

B.

Bac. Abr.——Bacon's Abridgement

1, 2 *Blac. Com.*——Blackſtone's Commentaries, 1ſt and 2d Vol.

1, 2 *Blac. Rep.*——Blackſtone's Reports, in 2 Vols.

Br. or *Bro.*——Brooke's Abridgement

Brownl.——Brownlow's Reports

1, 2 *Bulſt.*——Bulſtrode's Reports 1ſt and 2d Part

Burn Eccl. Law——Burn's Eccleſiaſtical Law

Burr.——Burrow's Reports

C.

Carth.——Carthew's Reports

2 *Chan. Ca.*——Chancery Caſes, 2d Part

Chan. Prec.——Chancery Precedents

Chan. Rep.——Chancery Reports

Cod.——Gibſon's Codex Eccleſiaſtici Anglicani

Co. Entr.——Coke's Entries

Coke Lit. or 1 *Inſt.*——Coke's 1ſt Inſtitutes, or Coke upon Littleton

4, 5, 7 *Co.* or *Rep.*——The 4th, 5th, 7th, &c. Parts of Coke's Reports

Comb.——Comberbach's Reports

Cro. Car. or 3 *Cro.*——Croke's Reports of Caſes in the Reign of King Charles I.

Cro. Eliz. or 1 *Cro.*——Croke's Reports of Caſes in the Reign of Queen Elizabeth.

Cro. Jac. or 2 *Cro.*——Croke's Reports of Caſes in the Reign of King James.

D.

Deg.——Sir Simon Degge's Parſon's Counſellor

Dy.——Dyer's Reports

H.

Hawk. Pl.——Hawkins's Pleas of the Crown

Hob.——Hobart's Reports

Hutt.——Hutton's Reports

I.

Jenk.——Jenkin's Century Caſes

1, 2, 3 *Inſt.*——The 1ſt, 2d, and

and 3d Parts of Lord Coke's Inſtitutes
Jo.——Sir William Jones's Reports

K.

2 Keb.——Keble's Reports

L.

Lane——Lane's Reports
3 Lew.——Levinz's Reports
Lutw.——Lutwich's Reports

M.

12 Mod.——Caſes in King William's Reign, now diſtinguiſhed as Twelfth Modern Reports
Mo.——Moore's Reports

N.

Noy——Noy's Reports

O.

Ow.——Owen's Reports

P.

Pl. Com. or *Com.*——Plowden's Commentaries

R.

Ray. or *Raym.*——Sir Thomas Raymond's Reports
1, 2 Roll. Abr.——Roll's Abridgement, in 2 Parts
1, 2 Roll. Rep.——Roll's Reports, in 2 Parts

S.

Saund.——Saunders's Reports
Sayer——Sayer's Reports
1, 2 Sid.——Siderſin's Reports, in 2 Vols.
Show. Parl. Ca.——Showers Parliamentary Caſes
Skin.——Skinner's Reports
Stran.——Strange's Reports

V.

Vaugh.——Vaughan's Reports
Vern.——Vernon's Reports

W.

Watſon. Cl. Law.——Watſon's Clergyman's Law
Winch.——Winch's Reports.

NOTE. *1 H. 1. 1 H. 2. 3 Ed. 1. 3 Ed. 2.* and ſo on, are references to the year books, or reports of caſes adjudged and taken down by reporters appointed for that purpoſe, in the ſeveral terms and years of thoſe Kings; and *M.* or *Mich. 1 H. 1.* ſignifies *Michaelmas* term, in the firſt year of the reign of king *Henry* I. and ſo *Hill.* or *H.* for *Hillary* term, *Paſch.* for *Eaſter* term, and *T.* or *Trin.* for *Trinity* term, in theſe years and reigns, *&c.*

Law of Simony.

CHAP. I.

Definition, and oath of Simony, and by what authority this oath is adminiſtred.

SIMONY is the corrupt preſentation of any one to an eccleſiaſtical benefice for money, gift, or reward. It is ſo called from the reſemblance it is ſaid to bear to the ſin of *Simon Magus*, though the purchaſing of holy orders ſeems to approach nearer to *his* offence. It was by the common law a very grievous *crime*; and is ſo much the more odious, becauſe, as Sir *Edw. Coke* obſerves (3 *Inſt.* 156), it is ever accompanied with perjury; for the preſentee is ſworn to have committed no Simony. However it is not an offence puniſhable in a criminal way at the common law (*Moor* 564); it being thought ſufficient to leave the clerk to eccleſiaſtical cenſures; but as theſe did not affect the ſimoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to reſtrain it by means of civil forfeitures; which the modern prevailing uſage, with regard to ſpiritual preferments, calls aloud to be put in execution. 2 Black. Com. 278.

Simony is a contract either with the patron to preſent, or with the ordinary to inſtitute; and if it be neither of them, it is not Simony *at common law*. *Simoniacus* is the perſon who makes ſuch promiſe; and he is made incapable to take any other benefice; but *ſimoniacè promotus* is where a friend of a man not knowing it, gives money to the patron or ordinary, to preſent, or inſtitute. *Per Doderidge* juſtice. 2 *Roll. Rep.* 465. *Mich.* 22 *Jac.* 1. *B. R.* in the caſe of *Wilſon* v. *Bradſhaw*

In *Cro. Eliz.* 788. Simony is defined to be, *Voluntas, ſive deſiderium emendi vel vendendi ſpiritualia, vel ſpiritualibus adhærentia.*

Lord *Coke*, in 3 *Inſt.* 153, ſays, that Simony is *deſcribed* by the act 31 *Eliz. c.* 6.

What is or what is not Simony *now* depends on the ſtat. of 31 *Eliz. c.* 6. which did not adopt all the wild notions of the canon law; but has *defined* it to be a corrupt agreement to preſent. *Per* chief juſtice *De Grey*, in the caſe of *Barret* and another againſt *Glubb* and another, 2 *Black. Rep.* 1052.——*For the act* 31 Eliz. c. 6. *See the next chapter.*

Preſentation is no *profit* to the patron, but *pre-eminence*, and the profits are to the parſon; for if the patron *takes the profits*, it is Simony. *Br.* iſſues *Ret. pl.* 21. *cites* 24 *E.* 3. 29.

Canon 40 of the canons made in 1603.

To avoid the deteſtable ſin of Simony, becauſe buying and ſelling of ſpiritual and eccleſiaſtical functions, officers, promotions, dignities and livings is execrable before God; therefore the archbiſhop and all and every biſhop or biſhops or any other perſon or perſons having authority to admit, inſtitute, collate, inſtal, or to confirm the election of any archbiſhop, biſhop or other perſon or perſons, to any ſpiritual or eccleſiaſtical function, dignity, promotion, title, office, juriſdiction, place or benefice with cure or without cure, or to any eccleſiaſtical living whatſoever, ſhall before every ſuch admiſſion, inſtitution, collation, inſtallation or confirmation of election reſpectively, miniſter to every perſon hereafter to be admitted, inſtituted, collated, inſtalled or confirmed in or to any archbiſhoprick, biſhoprick or other ſpiritual or eccleſiaſtical function, dignity, promotion, title, office, juriſdiction, place or benefice with cure or without cure, or in or to any eccleſiaſtical living whatſoever, this oath in manner and form following, the ſame to be taken by every one whom it concerneth, in his own perſon, and not by a proctor: "*I N. N.* do ſwear, that I have made "no ſimoniacal payment, contract or promiſe, directly "or indirectly, by myſelf, or by any other to my "knowledge or with my conſent, to any perſon or per- "ſons whatſoever, for or concerning the procuring and "obtaining of this eccleſiaſtical dignity, place, prefer- "ment, office, or living" [reſpectively and particularly naming the ſame, whereunto he is to be admitted, inſtituted, collated, inſtalled, or confirmed], "nor will "at any time hereafter perform or ſatisfy any ſuch kind "of payment, contract or promiſe made by any other "without my knowledge or conſent: So help me God "thro' Jeſus Chriſt."

Oath of Simony.

The

The canons of 1603 were made by the biſhops in convocation aſſembled by virtue of the king's writ, and confirmed by his charter under the great ſeal;——and the king's conſent to a canon, *in re eccleſiaſtica*, makes it a law to bind the clergy, but not the laity. *Per* lord *Hardwicke* in the caſe of *Middleton* v. *Croft*. Authority of the canons in 1603. Stran. Rep. 1056.

The authority of the convocation of 1603, and many points of eccleſiaſtical juriſdiction, are eſtabliſhed by this determination of the court of king's bench.——Sir *John Strange* reports only the opinion of the court; which is more fully and circumſtantially reported in *Cunningham*'s reports of caſes in lord *Hardwicke*'s time; wherein are alſo inſerted the arguments of the civilians and counſel on both ſides, but not in Sir *John Strange*.

CHAP. II.

Of Simony by the canon and common law; the Stat. 31 Eliz. c. 6. *concerning it; and the erroneous opinions of chief juſtice* Holt *and ſeveral other judges in ſaying that the word Simony is not in that Act.*

AS by the purchaſe of eccleſiaſtical benefices worthy and learned men may be kept out of the church, and a door may, to the great ſcandal of religion and prejudice of morality, be opened to perſons by no means qualified to diſcharge the duties of the ſacred function, it is of the utmoſt conſequence to ſociety that it be prevented. With a view to this, Sir *Simon Degge* ſays, that by ſome *general* canons a perſon ſimoniacally promoted is puniſhed by deprivation, and a Simoniack, by deprivation and perpetual diſability, not only as to the church he was preſented to upon a ſimoniacal contract, but alſo to *all* others. *Deg. part* 1. *c.* 3.

In 1 *Inſt.* 17. *b.* a corrupt bargain, for a benefice, is ſaid to be ſo deteſtable in the eye of the common law, that a plaintiff in *quare impedit* could not before the ſtatute of *Weſtm.* 2. recover damages for the loſs of his preſentation; it being conſidered as a thing of no value. And in 1 *Inſt.* 89. it is ſaid, that a guardian in ſocage could not preſent to an advowſon in right of his heir; becauſe, as he could take nothing for the preſentation, he could not bring it to account.

In the caſe of *Mackaller*, v. *Todderick*, *Cro. Car.* 361: it is ſaid, *per Curiam*, that Simony was an offence at common law, before the ſtat. of 31 *Eliz. c.* 6.

In *Winchcomb* v. *Pulleſton*, *Hob.* 167, it is laid down, that a bond upon a ſimoniacal contract is againſt law, becauſe it is given upon a contract *ex turpi cauſa*, and *contra bonos mores*; nay that it is as void as an uſurious bond, which if an executor pay, he is guilty of a *devaſtavit*.

In *Carth.* 252. *Bartlett* v. *Vinor*, ſuch bond is ſaid to to be void, as being againſt law, although it be not ſo declared by the ſtatute.

Other authorities might be added; but theſe are ſufficient to ſhew, that a corrupt bargain for preſenting to a benefice is an offence at the common law.

But as neither the conſideration of the greatneſs of the offence of Simony, nor the proviſion made againſt it by the canon or common law, was ſufficient to put a ſtop to this offence, it was at length prohibited under very ſevere penalties, by the following act:

Stat. 31 *Eliz.* [*A. D.* 1589] *cap.* 6. Intitled "an act "againſt abuſes in election of ſcholars, *and preſentation to benefices.*

Note, the 3 firſt ſections of this act, and the *greater* part of the 4th, relate to the election of fellows, ſcholars, *&c.* into colleges, *&c.* But at the end of the 4th ſection are the following words: "And for the avoiding of SIMONY "and corruption in preſentations, collations and do-"nations, of and to benefices, dignities, prebends, "and other livings and promotions eccleſiaſtical, and "in admiſſions, inſtitutions and inductions to the "ſame:"

The penalty for preſenting to a benefice, or for being preſented for reward, Coke Entr. 516.

5. Be it further enacted by the authority aforeſaid, that if any perſon or perſons, bodies politick and corporate, ſhall or do at any time after the end of forty days next after the end of this ſeſſion of parliament, for any ſum of money, reward, gift, profit or benefit, directly or indirectly, or for, or by reaſon of any promiſe, agreement, grant, bond, covenant, or other aſſurance, of or for any ſum of money, reward, gift, profit or benefit whatſoever, directly or indirectly, preſent or collate any perſon to any benefice with cure of ſouls, dignity, prebend or living eccleſiaſtical, or give or beſtow the ſame, for or in reſpect of any ſuch corrupt cauſe or conſideration, that then every ſuch preſentation, collation, gift and beſtowing, and every ad-

admiſſion, inſtitution, inveſtiture, and induction thereupon, ſhall be utterly void, fruſtrate, and of none effect in law: (2) And that it ſhall and may be lawful to and for the queen's majeſty, her heirs and ſucceſſors, to preſent, collate unto, or give or beſtow every ſuch benefice, dignity, prebend and living eccleſiaſtical for that one time or turn only, (3) and that all and every perſon or perſons, bodies politick and corporate, that from thenceforth ſhall give or take any ſuch ſum of money, reward, gift, or benefit, directly or indirectly, or that ſhall take or make any ſuch promiſe, grant, bond, covenant, or other aſſurance, ſhall forfeit and loſe the double value of one year's profit of every ſuch benefice, dignity, prebend and living eccleſiaſtical; (4) and the perſon ſo corruptly taking, procuring, ſeeking or accepting any ſuch benefice, dignity, prebend, or living, ſhall thereupon, and from thenceforth, be adjudged a diſabled perſon in law, to have or enjoy the ſame benefice, dignity, prebend or living eccleſiaſtical. 3 Lev. 337.

6. And be it further enacted, that if any perſon ſhall at any time after forty days next after the end of this ſeſſion of parliament, for any ſum of money, reward, gift, profit or commodity whatſoever, directly or indirectly (other than for uſual and lawful fees), or for, or by reaſon of any promiſe, agreement, grant, covenant, bond, or other aſſurance, of or for any ſum of money, reward; gift, profit or benefit whatſoever, directly or indirectly, admit, inſtitute, inſtal, induct, inveſt or place any perſon in, or to any benefice with cure of ſouls, dignity, prebend, or other living eccleſiaſtical; that then every ſuch perſon, ſo offending, ſhall forfeit and loſe the double value of one year's profit of every ſuch benefice, dignity, prebend and living eccleſiaſtical; (2) and that thereupon immediately from and after the inveſting, inſtallation or induction thereof had, the ſame benefice, dignity, prebend, and livings eccleſiaſtical, ſhall be eſtſoons meerly void; (3) And that the patron or perſon to whom the advowſon, gift, preſentation or collation ſhall by law appertain, ſhall and may, by virtue of this act, preſent or collate unto give and diſpoſe of the ſame benefice, dignity, prebend, or living eccleſiaſtical, in ſuch ſort, to all intents and purpoſes, as if the party ſo admitted, inſtituted, inſtalled, inveſted, inducted or placed, had been, or were naturally dead.

The penalty for [illegible] for being preſented to a benefice with cure, &c. for reward.
2 Rol. 465.
Cro. El. 642.
Cro. Jac. 385.
Cro Car. 330.

7. Provided always, that no title to confer or preſent by lapſe, ſhall accrue upon any voidance mentioned in this

No title to confer by lapſe, but after ſix months after notice.

this act, but after ſix months next after notice given of ſuch voidance, by the ordinary to the patron.

The penalty for corrupt reſigning or exchanging of a benefice with cure of ſouls.

8. And be it further enacted by the authority aforeſaid, that if any incumbent of any benefice with cure of ſouls, after the end of the ſaid forty days, do, or ſhall corruptly reſign or exchange the ſame, or corruptly take for, or in reſpect of the reſigning or exchanging of the ſame, directly or indirectly, any penſion, ſum of money, or benefit whatſoever; that then as well the giver, as the taker of any ſuch penſion, ſum of money, or other benefit corruptly, ſhall loſe double the value of the ſum ſo given, taken or had; (2) the one moiety as well thereof, as of the forfeiture of double value of one year's profit before mentioned, to be to the queen's majeſty, her heirs and ſucceſſors, and the other moiety to him or them that will ſue for the ſame, by action of debt, bill or information, in any of her majeſty's courts of record, in which no eſſoin, protection or wager of law or privilege ſhall be admitted or allowed.

Penalties inflicted by the eccleſiaſtical law be not taken away by this ſtatute.

9. Provided always, that this act, or any thing herein contained, ſhall not in any wiſe extend to take away or reſtrain any puniſhment, pain or penalty limited, preſcribed or inflicted by the laws eccleſiaſtical, for any the offences before in this act mentioned, but that the ſame ſhall remain in force, and may be put in due execution, as it might be before the making of this act; this act, or any thing therein contained to the contrary thereof, in any wiſe notwithſtanding.

The penalty for giving or taking of rewards to make miniſters, or to give licence to preach.

10. Provided further, and be it enacted by the authority aforeſaid, that if any perſon or perſons whatſoever, ſhall or do, at any time after the end of this ſeſſion of parliament, receive or take any money, fee, reward, or any other profit, directly or indirectly, or ſhall take any promiſe, agreement, covenant, bond, or other aſſurance, to receive or have any money, fee, reward, or any other profit, directly or indirectly, either to him or themſelves, or to any other of their or any of their friends (all ordinary and lawful fees only excepted), for, or to procure the ordaining or making of any miniſter or miniſters, or giving of any orders, or licence or licences to preach; that then every perſon and perſons, ſo offending, ſhall for every ſuch offence forfeit and loſe the ſum of forty pounds of lawful money of *England*; (2) and the party ſo corruptly ordained or made miniſter, or taking orders, ſhall forfeit and loſe the ſum of ten pounds: (3) And it

at

at any time within ſeven years next after ſuch corrupt entring into the miniſtry, or receiving of orders, he ſhall accept or take any benefice, living, or promotion eccleſiaſtical, that then immediately from and after the induction, inveſting, or inſtallation thereof, or thereinto had, the ſame benefice, living, and promotion eccleſiaſtical, ſhall be eſtſoons meerly void; (4) and that the patron or perſon to whom the advowſon, gift, preſentation, or collation ſhall by law appertain, ſhall and may, by virtue of this act, preſent or collate unto, give and diſpoſe of the ſame benefice, living, or promotion eccleſiaſtical, in ſuch ſort, to all intents and purpoſes, as if the party ſo inducted, inveſted or inſtalled, had been, or were naturally dead; any law, ordinance, qualification or diſpenſation to the contrary notwithſtanding; (5) the one moiety of all which forfeitures ſhall be to our ſovereign lady the queen, her heirs and ſucceſſors, and the other moiety to him or them that will ſue for the ſame, by action of debt, bill, plaint, or information, in any of her majeſty's courts of record, in which no eſſoin, protection, privilege, or wager of law, ſhall be admitted or allowed. *Coke Lit.* 120. *a.*

Who ſhall have the forfeitures, and by what means.

It is remarkable that many learned judges have ſaid that the word *Simony* is not mentioned in the ſaid act of 31 *Eliz. cap.* 6. as appears from the five following authorities: 1*ſt.* Note, that in this ſtatute there is no word of Simony; for by that means the common law would have been judge what ſhould have been Simony, and what not. *Noy* 25, in caſe of *Winchcombe* v. *Puleſton, Mich.* 15 *Jac.* 1. A. D. 1617.——2*d.* The ſtatute of purpoſe forbears to uſe the word *Simony*, for avoiding nice conſtruction of that word in the civil law; and therefore the makers of the act ſet down plainly the words of the ſtatute, that if any be promoted for money, *&c.* ſo that it is not material from whom the money comes, *per Tanfield*, Ch. B. *Lane* 103. 8 *Jac.* A. D. 1610. in the *Exchequer*, in caſe of *Kitchin* v. *Calvert:* ——3*d.* Simony is an offence by the canon law, of which the common law takes no notice to puniſh it; for there is not a word of Simony in the ſtatute of *Eliz.* but of buying and ſelling: And the canons of 1603 make Simony a great offence, and to thoſe canons the clergy are ſubject, though ſome queſtion has been made as to the canons of 1640. *per Holt*, Ch. J. Ld. *Raym.* Rep. 449. *Mich.* 10 *Will.* 3. Biſhop of St. *David's* v. *Lucy.* The common law takes

Erroneous opinion of the the judges, &c.

I think the imputation erroneous: for, I conceive that, what the judges & others meant was, that the word simony was not used in the enacting part of the statute; & the word is only mentioned in the introductory part of an enacting clause.

takes no notice of any Simony but what the ſtatute mentions, which has not defined Simony in ſuch a manner as to ſay what ſhall be Simony, and what not, by the ſpiritual law. 12 *Mod.* 238. in *S. C.*——It was urged, that in pleading a man to be a Simoniſt, it is neceſſary to ſhew ſome particular act of Simony, to which *Holt*, Ch. J. agreed, becauſe the word Simony is not in the act, and therefore it is neceſſary to ſhew, *&c.* to bring the perſon *within* the act. *Comb.* 108. *Paſch.* 1. *W & M. B. R.* in caſe of *Betts* v. *Lowe*.

But the word *Simony* is in the act at the end of *ſec.* 4. (See p. 4.) *and for avoiding of Simony*, &c. Perhaps lord *Holt*, who was chief juſtice in king *William*'s time, was led into this error by reading *Noy*'s and *Lane*'s reports, which were publiſhed in 1656, 1657, and 1669.

CHAP. III.

Commentaries, and determinations upon Stat. 31 Eliz. c. 6. *from Lord* Coke, *and other reporters.*

Before this act, patron in no danger of ſuffering; and perſon coming in by Simony muſt be judicially deprived.

A Corrupt patron was not in danger of ſuffering by any law or canon before this act was made; for his right could not be taken away by a mere canon not confirmed by parliament; and before this law was made, the incumbent that came in by Simony held the living, until he was legally and judicially deprived by ſentence of the eccleſiaſtical court, from which he often eſcaped for want of ſuch proof as the ſpiritual law required. But this ſtatute ſtrikes at the root, and makes as well the preſentation, as the admiſſion, inſtitution and induction, void. So that if this ſtatute had not given the preſentation to the crown, the true patron might have preſented a new clerk; or in his default the church would have lapſed. Sir *Simon Degge*, *p.* 1. *c.* 5. *Hob.* 167.

But by this act the corrupt patron does not only loſe the preſentation to the king *pro hac vice*, but alſo two years value of the church; not according to the valuation in the king's books in the firſt-fruit office, but according to the true and utmoſt annual value of the church. 3 *Inſt.* 154.

But if one that has no right to preſent ſhall, by means of a corrupt and ſimoniacal agreement preſent a clerk, who is by his preſentation admitted, inſtituted, and inducted

into a church; yet this ſhall not intitle the king to preſent; for though the act of parliament makes all void, yet an uſurper cannot forfeit the right of another in whom there is no fault. 3 *Inſt.* 153.

For or by reaſon of any promiſe. See page 4, ſect. 5.] Promiſe of money to procure a perſon to be made rector of a void rectory, is ſimoniacal, and againſt law. *Jo.* 341. *Paſch.* 10 *Car.* 1. *B. R. Totteridge* v. *Mackalley. Cro. Car.* 361. *S. C.*

Shall be utterly void. See p. 4, ſect. 5.] It was reſolved *per tot Cur.* that if any ſhall take money, fee, reward, or other profit for any preſentation to a benefice with cure, though in truth he who is preſented be not knowing of it, yet the preſentation, admiſſion, and induction, are void by the expreſs words of the ſtatute of 31 *Eliz. c.* 6. and the king ſhall have the preſentation *hac vice*; for the ſtatute intends to inflict puniſhment *upon the patron* as upon the *author* of the corruption, by the loſs of his preſentation, and upon the incumbent who came in by ſuch a corrupt patron, by the loſs of his incumbency, though he never knew of it; but if the preſentee be not cognizant of the corruption, then he ſhall not be within the clauſe of diſability. And ſo it was reſolved by all the juſtices in *Fleet-ſtreet*, *Mich.* 8 *Jac.* 12 Rep. 100 in the caſe of Dr. *Hutchinſon*. And ſays the ſtatute is very well penned againſt the avarice of corrupt patrons. *S. P.* 3 *Inſt.* 154. and ſays it was reſolved, *Mich.* 13 *Jac.* 1.

Preſentation for money, &c. void, tho' perſon preſented knows nothing of it.

Be adjudged a diſabled perſon in law. See p. 5, ſect. 5.] It was reſolved, that the king could not diſpenſe with this diſability by a *non obſtante*: for when an act of parliament is made that diſableth any perſon, or maketh any thing void or tortious for the good of the church, or commonwealth, in this law all the king's ſubjects have an intereſt, and therefore the king cannot diſpenſe therewith no more than he can with the common law: but where a ſtatute prohibiteth any thing upon a penalty, and gives a penalty to the king, or to the king and informer, there the king may diſpenſe with the penalty, and the diverſity is warranted by our books. 3 *Inſt.* 154.

Be it further enacted. &c. *See p.* 5, *ſect.* 6.] The reaſon of this clauſe (for I was of this parliament, ſays Lord *Coke*, and obſerved the proceedings therein) was to avoid haſty and precipitate admiſſions, inſtitutions, *&c.* to the prejudice of them that had right to preſent, by putting them

them to a *quare impedit*, and no ſuch haſte or precipitation is uſed, but for reward, *&c.* as it is to be preſumed. There are two great enemies to juſtice and right, *viz. precipitatio & moroſa cunctatio.* And although the church is full by the inſtitution, *&c.* againſt all but the king, yet the church becometh not void by this branch of this act, until after induction. 3 *Inſt.* 155.

And that the patron, &c. ſhall and may preſent. See p. 5. ſect. 6.] This is intended of the rightful patron, or of him that hath right to preſent. 3 *Inſt.* 155.

Simony worſe than felony.

Simony, ſays Lord *Coke*, in the caſe of Sir *William Boyer*, againſt the high commiſſion court, upon a prohibition, is worſe than felony; it is an enormous crime, if money be paid to preſent one to a benefice, though it be not paid to the patron, nor had the patron any knowledge of it, yet the incumbent ſhall by this, be deprived of his benefice, and the patron alſo, *pro hac vice*, ſhall loſe his preſentation. 2 *Bulſt.* 182.

Simoniacal agreement with the patron's wife.

Where the incumbent made a ſimoniacal agreement with the wife or friend of the patron, and the patron knows not thereof, and the incumbent is preſented thereto by means of the ſimoniacal agreement ſo made, he is within the ſtat. 31 *Eliz.* and the king may preſent. *Cro. J.* 385. *pl.* 16. *per Coke*, Ch. J. *Mich.* 13 *Jac.* 1. *B. R.* The King *v.* The Biſhop of *Norwich*, *Cole*, and *Saker*.

Simony unknown to the patron and clerk.

Error to reverſe a judgment in *quare impedit*, where the king had recovered upon a title of Simony. The agreement was, that a friend of the clerk ſhould give *I. S.* ſo much money to procure him to be preſented, and that he was preſented *ſecundum agreamentum præd.* The error aſſigned was, that neither the patron nor clerk knew of any thing given. But *per Cur.* he was *ſimoniacè promotus*, and the preſentation *ſecundum agreamentum præd.* is a good averment of a ſimoniacal promotion. And the judgment was affirmed. *Sid.* 329. *pl.* 10. *Paſch.* 19 *Car.* 2. *B. R. The King* v. *Truſſel.* In this caſe was cited Dr. *Duxon*'s caſe, and that he had enjoyed the church of St. *Clement*'s more than 20 years under ſuch title from the King, the preſentee of the patron being ouſted, becauſe a friend had given money to the page of the earl of *Exeter* to procure it for him, and yet neither the lord nor the parſon knew any thing of it. *ibid.*

Intent of the ſtatute 31 Eliz.

The intent of the ſtatute was to eradicate *all manner* of Simonies; and therefore the words are not, if any give money to be preſented, but they are, if any preſent for money.

money. *Per* baron *Bromley*. *Lane* 100 in caſe of *Kitchin v. Calvert*. *Hil.* 8 *Jac.* 1.

If money agreed to be given to patron's friend, it is Simony.

In *quare impedit* the plaintiff declared that *I. S.* was ſeiſed of the advowſon in fee, and preſented *W.* and granted the next avoidance to *C. B.* and that the church became void by the death of *W.* and then ſets forth the ſtatute of 31 *Eliz.* of Simony; and that the church being ſo void, it was corruptly agreed between *R.* a friend of *C. B.* and one *T.* but in the behalf of *C. B.* that he ſhould preſent *Hide*, and that *T.* ſhould pay to *R.* 20l. *per annum* for ſix years, if *Hide* ſhould ſo long live; and that purſuant to this agreement *T.* became bound to *R.* in 200l conditioned for the payment of 20l. *per annum*, as aforeſaid, which bond was to the uſe of *C. B.* who preſently thereupon preſented *Hide*, who was inſtituted, *&c.* which by virtue of that ſtatute was void, and ſo it belonged to the king to preſent, *&c.* The defendant *Hide*, the now incumbent, with a *proteſtando* to the agreement, and bond, pleaded that he had no notice of the agreement at the time of the preſentation, nor before: To this plea the attorney general demurred; *C. B.* with a *proteſtando* to the agreement and bond, pleaded that the preſentation was made freely, and traverſed the corrupt agreement, upon which they were at iſſue. Upon demurrer it was reſolved, *per tot. Cur.* that the notice is not material, becauſe in ſuch caſes it is very difficult to be proved, and the patron may truſt a friend, as here he did, to make the agreement, and before notice thereof given to him may preſent upon aſſurance, by certain ſigns made between them, intimating that ſuch agreement is perfected, and gave judgment accordingly, but *ceſſet executio* till the iſſue be tried. 3 *Lev.* 337, 338. *Mich.* 4 *W.* & *M. C. B.* The King *v.* The Biſhop of *Norwich*, *Hide*, *and Boughton*.

If the incumbent's brother contracts with the patron without the incumbent's knowledge, it is Simony.

Baker v. Rogers.

Prohibition upon demurrer. The caſe was; that one *Broughton*, ſeiſed in fee of the advowſon of *Barby*, the church being void, *Thomas Baker* contracted before the pardon 39 *Eliz.* with *Broughton* for this avoidance, who for 180l. granted it to *Thomas Baker*, who, by colour of that grant, preſented *Walter Baker* his brother (now plaintiff) who was admitted, inſtituted and inducted thereto: and after his induction, and before the pardon, *Thomas Baker* acquainted the plaintiff, what he paid for that avoidance, requiring him to have conſideration thereof. And, after the pardon of 39 *Eliz.* *Walter Baker* was ſued in the ſpiritual court, before the high commiſſioners, for Simony; and (the proof there being no more than

than as before is ſhewn) he was ſentenced, that this was Simony: and that *Walter Baker* was as an intruder, and his admiſſion, and inſtitution utterly void, and as if he never had been parſon; for ſo is their courſe there, when one is deprived as *Simoniacus*: and thereupon he brought the prohibition, compriſing all this matter, and the pardon, and that he was not a perſon excepted. The defendant pleaded the act of *primo Eliz.* which gives authority to the high commiſſioners, and the ſentence before them, and prayed a conſultation; but miſpleaded the act in the date, *viz.* 25 *January* for 23 *January*, &c. and it was thereupon demurred. Firſt, it was moved, that this preſentation was not by Simony; for although the contract was ſimoniacal for the avoidance, yet it was a mere void grant; for, the church being void, the avoidance cannot be granted, becauſe it is a thing in action (*quod fuit conceſſum*) then when he preſents, he gains it by uſurpation; and the preſentee is in, by that preſentment, by uſurpation, and not by the ſimoniacal contract. Secondly, although this be Simony in the preſenter, yet this acquainting of the preſentee therewith, after the induction, makes it not to be any Simony in him; but he is *quaſi* acceſſory thereto; which offence is not excepted in the pardon, although Simony itſelf be excepted: And the expoſition of a pardon belongs to the common law, and not to the ſpiritual court. And in 27 *Eliz.* in this court, in the caſe of one *Fox*, who was deprived, during the parliament, for incontinency, before the pardon, and another admitted, inſtituted, and inducted; and afterwards the pardon diſcharged the offence, it was adjudged, that this deprivation, and the others admiſſion alſo, were both of them utterly void. Wherefore, *&c.* But all the court held, that the prohibition lay not; for as to the firſt, although the preſentee comes in *quaſi per* uſurpation; yet becauſe it is by means of a ſimoniacal contract, which is the cauſe thereof (for otherwiſe it is to be intended, that he would not have permitted that preſentment) it was held, that it was as well Simony, as if the grant had not been void. And as to the ſecond, they held it to be Simony; for there are not any acceſſaries in Simony, but all are principals therein, as well as in treſpaſs: And it appertains to the ſpiritual court to determine it, and not to this court to meddle therewith; and when the ſpiritual court hath ſo ſentenced it, this court ought to give credence thereto, and ought not to diſpute, whether it be error, or not; for this court cannot take conu-

conuſance of their proceedings, whether they be lawful, or not: which is the reaſon, that in this court, it ſufficeth to plead a ſentence out of the ſpiritual court, briefly, without ſhewing the manner thereof, or of their proceedings. And, as the caſe is in the Lord *Dyer*, if the ſpiritual court will certify the ſpecial matter, upon a certificate of matrimony, or baſtardy, or the like, it is not good: But they ought to certify preciſely the one way, or other; for this court cannot adjudge of that ſpecial matter, but it appertains to their law to determine it. And although it were ſaid, That, in the ſpiritual court, they ought not to have intermeddled, to deveſt the free-hold, which is in the incumbent after the induction; true it is, they ſhould not meddle to alter the free-hold; but they meddled only with his manner of obtaining his preſentment, which, by conſequence, deveſted the free-hold from him, by the diſſolution of his eſtate, when his admiſſion, and inſtitution is avoided. And, as to the miſrecital of the ſtatute, it is not material, becauſe it is in barr, and the prohibition itſelf lies not. And they all held, that it was Simony in the incumbent, although he were not privy thereto at the firſt; and Simony was defined to be, *voluntas, ſive deſiderium emendi, vel vendendi ſpiritualia, vel ſpiritualibus adhærentia.* And *Warburton* ſaid, That, if one be preſented by Simony, and he, who is preſented, is party, or privy to the Simony, he ſhall be deprived, and always diſabled to take any other benefice: But, if he be preſented by Simony between two ſtrangers, whereto he is not privy, he is deprivable, by reaſon of the corruption, but not diſabled to take any other; and that is the rule of the civil law. Wherefore they all, after ſeveral arguments, agreed, That the prohibition lay not: And conſultation was awarded.

Note, no conſultation awarded upon the roll. *Cro. Eliz.* 788. *Mich.* 42 and 43 *Eliz.*

Donatives are within the ſtatute 31 *El.* Eliz.

Information. The church in the tower of *London* being a *donative* of the king, became void by reſignation, and the defendant agreed with *J. S.* to give him 20*l.* if he could procure a preſentation, *&c.* for him from the king, which he did accordingly, and the defendant was inducted; it was inſiſted, that this being a donative, is not within the ſtat. 31 *Eliz.* becauſe that mentions only where one comes in by Simony *by preſentment or collation: ſed non allocatur*; becauſe it is within equal miſchief. Then it was objected, that this could not be within the ſtatute;

ſtatute; becauſe the king being donor, it cannot be intended that he preſented for Simony, and that the patron ſhall loſe his preſentation for that time, and therefore ſhall not extend to any of the king's donations: *ſed non allocatur*. For Simony may be between ſtrangers, without the privity of the incumbent or patron. And rule was given to enter judgment for the plaintiff. *Cro. Car.* 330, 331. *pl.* 15. *Mich.* 9 *Car.* 1. *B. R. Bawderock* v. *Mackaller*.

Note, in this caſe is another error (ſee *p.* 7.) in ſaying, that the Stat. mentions only *Simony by preſentment or collation*, whereas the words are *Simony and corruption in preſentations, collations, and* DONATIONS, *&c.* See *p.* 4. *ſect.* 4.

CHAP. IV.

Caſes adjudged at law, and in equity, reſpecting general *and* ſpecial *bonds of reſignation.*

A Bond of reſignation is a bond given by the perſon intended to be preſented to a benefice with condition to reſign the ſame, and is *ſpecial* or *general*: The condition of a ſpecial one is to reſign the benefice in favour of ſome certain perſon, as a ſon, kinſman or friend of the patron, when he ſhall be capable of taking the ſame. By a *general* bond, the incumbent is bound to reſign, on the *requeſt* of the patron.

Bond to pay money for reſignation of a benefice, good. Oldbury v. Gregory.

In debt upon bond conditioned to pay 100 l at *Michaelmas*; defendant pleads the money was to be paid for *reſignation* of a benefice with intent that another ſhould be preſented, and ſhewed that the patron, obligor, and obligee were parties to the agreement, and demands judgment, becauſe it was upon a contract of Simony which is againſt law. The plaintiff demurred, and adjudged for the plaintiff, *becauſe Simony is not againſt our law*, and *no ſuch contract or obligation is made void by any ſtatute in our law*, nor *is it averrable that the money is for other cauſe than the obligation expreſſes*. Mo. 564. pl. 769. Paſch. 40 Eliz. C. B.

This caſe denied to be law.—Chancery would compel a diſcovery of the conſideration of ſuch a bond.

Powel juſtice denied this caſe of *Oldbury* v. *Gregory* to be law, and cited a caſe where, in an action on ſuch a bond, defendant brought a bill in *Chancery* againſt the plaintiff, and becauſe the plaintiff could not give a good account of the *cauſe* of the taking ſuch bond, the court granted

a perpetual injunction. 12 *Mod.* 505. *Paſch.* 13 *Wil.* 3. in *C. B. Anon.*

Bond to reſign when the patron's ſon ſhould be capable, lawful. Johnes v. Lawrence.

Debt upon an obligation of 1000 marks conditioned. Whereas the obligee had procured from queen *Elizabeth*, letters of preſentation to the church of *Stretham*, and was to preſent *Lawrence*, intending, when his ſon *Johnes* ſhould be capable, to procure another preſentation of him to the ſaid church, if the ſaid obligor within three months after requeſt, upon his preſentation, admiſſion, inſtitution and induction to the ſaid church, ſhould reſign his benefice abſolutely: That then the obligation ſhall be void. The defendant pleads, that he was not requeſted: And iſſue joined thereupon and found for the plaintiff. And moved in arreſt of judgment. 1. That it appears, by the condition of the bond, to be a ſimoniacal contract, and againſt law; and therefore the obligation void: *Sed non allocatur*; for there doth not any Simony appear upon the condition; and ſuch a condition is good enough and lawful: Wherefore it was adjudged for the plaintiff. Afterwards a writ of error was brought upon this judgement in the *Exchequer Chamber*, and the principal error inſiſted upon, was, that this condition is againſt law; for it appears upon the condition entered, that it was for Simony; which makes the obligation void. But all the judges of *Common Bench* and barons of the *Exchequer* held, that the obligation and condition are good enough; for a man may bind himſelf to reſign and it is not unlawful, but may be upon good and valuable reaſons, without any colour of Simony; as to be obliged to reſign, if he take another benefice; or if he be non-reſident for the ſpace of ſo many months; or, as this caſe is, to reſign upon requeſt, if the patron will preſent his ſon thereto, when he ſhould be of age capable to take it. But if it had been averred, that it was *per colorem Simonii, viz.* If he did not ſuffer the patron to enjoy a leaſe of the glebe or tythes; or if he did not pay ſuch a ſum of money; that had been Simony, and it is poſſible might have made the obligation void: But, as this caſe is, there doth not appear any cauſe to adjudge it to be void for Simony: Wherefore the judgment was affirmed. *Cro. Jac.* 248. *Trin.* 8 *Jac.* 1. in *B. R.* A. D. 1610.

Lawrence v. Johnes: The preceding caſe in the Exchequer Chamber.

Debt upon an obligation of one thouſand marks, conditioned, Whereas he was preſented to the church of *Stretham*, in the iſle of *Ely*, that if he reſigned the benefice within a month, after requeſt made unto him, *viz.* at the parſonage houſe of *Stretham*; That then, *&c.* The defendant

fendant pleads, *non requiſivit*, and found againſt him, and adjudged for the plaintiff: And error thereof brought and aſſigned; Firſt, for that the plaintiff alledgeth a requeſt, *viz.* At the parſonage houſe of *Stretham*: Whereas, it being the place of requeſt, ought to have been alledged preciſely, and not under a *viz.* &c. *ſed non allocatur*; for that is the uſual courſe. Secondly, becauſe a requeſt is alledged, and it is not ſhewn, that he gave notice of the time of the requeſt to the party; or that the party was preſent: *ſed non allocatur*; for being alledged to be made unto him at the ſaid place, it is to be intended, he was preſent there: And being found preciſely to have been made, therein is included, that he was preſent, and had ſufficient notice given him; otherwiſe they ought not to find the requeſt. Thirdly, becauſe the *ven. fac* was *de Stretham*; it not being named as a village or hamlet, but rather as a pariſh: *ſed non allocatur*; for the parſonage houſe of *Stretham* is intended to be a village: and a pariſh and village are intended all one, if the contrary be not ſhewn. Fourthly, it was moved that the bond was made for Simony, it being to compel him to reſign: *ſed non allocatur*; for it is not Simony, but *good policy to tie him to reſign*; and if it were, it is not material: Wherefore the judgment was affirmed. *Cro. Jac.* 274. *Paſch.* 9 *Jac.* 1.

Bond to reſign after 3 months notice, unlawful. Sir John Paſchal v. Clark.

It was ſaid by the court upon evidence, that if the patron preſent one to the advowſon, having taken an obligation of the preſentee, that he ſhall reſign when the obligee *will*, after three months warning, that is Simony within the 31 *Eliz. c.* 6. *Noy* 22. *Trin.* 15 *Jac.* 1. *C. B. rot.* 2051.

A true copy of the original record in this cauſe, will be inſerted in an APPENDIX.

Bond to reſign upon requeſt, lawful. Babington v. Wood.

Debt upon an obligation conditioned. Whereas the plaintiff intended to preſent the defendant to ſuch a benefice, that if the defendant at any time after his admiſſion, inſtitution, and induction, at the plaintiff's requeſt reſigned the ſaid benefice into the hands of the biſhop of *London*, that then, &c. The defendent upon *oyer* of the condition demurred generally; and this was argued by *Grimſton*, for the petitioner, and by *Calthrop*, for the defendant, who ſhewed, that the cauſe of demurrer was, for that, the condition of the bond being to reſign upon requeſt of the patron, it is Simony, and againſt law; ſo the bond void. But all the court conceived, that if the plaintiff had averred, that the obligation was made to bind him

him to pay such a sum, or to make a lease or other act, which appears in itself to be Simony; then upon such a plea, peradventure, it might have appeared to the court to be Simony, and might have been a question, whether such a bond for Simony should be void? But as it is pleaded by way of demurrer upon the *oyer* of the condition, it doth not appear, that there is any Simony; for such a bond to cause him to resign, *may* be good, and upon good reason and discretion required by the patron, (*viz.*) if he be *non resident*, or takes a second benefice by a qualification or the like, and a precedent was shewn, in *octavo Jacobi*, betwixt *Johnes* and *Lawrence*, where such a bond was made to resign a benefice upon request, when the son of *Johnes* came to be 24 years of age, to the intent, that he might be presented unto it: And it was adjudged good in the *King's Bench*, and affirmed in a writ of error in the *Exchequer Chamber*. And of this opinion was all the court; whereupon judgment was given for the plaintiff. *Cro. Car.* 180. 9 *Car.* 1. *B. R. A. D.* 1633. *Hutt. S. C.* accordingly; and says, that upon error brought in the *Exchequer Chamber*, the judgment was affirmed.—*Jo.* 220. *S. C.* accordingly, and that it was affirmed in error upon viewing the precedent of *Johnes* v. *Lawrence*.

Bond of resignation said to be adjudged good a dozen times. Baker v. Watson.

Error of a judgment in *C. B.* in debt on obligation conditional to resign on request; the defendant after *oyer* pleads resignation, to which the plaintiff replies he did not resign, *et hoc petit quod inquiratur*, to which the defendant demurs, because the condition is void. And 2dly the resignation is triable by certificate, and not *per pais*; Winnington *contra pro* defendant in the writ of error; and *per curiam*, it hath been above a dozen times adjudged, that the condition is good, and they also inclined the resignation should be tried *per pais*, and not by certificate. But *adjornatur*. 2 *Keb.* 446. *Hil.* 20 & 21 *Car.* 2. *B. R.*

The preceding case differently reported.

In debt upon bond conditioned to resign upon request; the defendant pleads, that he did resign according to the condition, which was found against him; and judgment for the plaintiff. The defendant brought a writ of error, because it was a simoniacal condition; but the judgment was affirmed, because the condition is good. *Raym.* 175. *Hil.* 21 & 22 *Car.* 2. *B. R. Watson* v. *Baker*.

——*Sid.* 387. *pl.* 24. *S. C.* but reports, that the defendant pleaded in *C. B. quod resignavit*; to which the plaintiff replied, *non resignavit*; whereupon the defendant demurred generally: And that judgment was given in *C. B.* for the plaintiff upon this single

ſendant pleads, *non requiſivit*, and found againſt him, and adjudged for the plaintiff: And error thereof brought and aſſigned; Firſt, for that the plaintiff alledgeth a requeſt, *viz.* At the parſonage houſe of *Stretham*: Whereas, it being the place of requeſt, ought to have been alledged preciſely, and not under a *viz.* &c. *ſed non allocatur*; for that is the uſual courſe. Secondly, becauſe a requeſt is alledged, and it is not ſhewn, that he gave notice of the time of the requeſt to the party; or that the party was preſent: *ſed non allocatur*; for being alledged to be made unto him at the ſaid place, it is to be intended, he was preſent there: And being found preciſely to have been made, therein is included, that he was preſent, and had ſufficient notice given him; otherwiſe they ought not to find the requeſt. Thirdly, becauſe the *ven. fac* was *de Stretham*; it not being named as a village or hamlet, but rather as a pariſh: *ſed non allocatur*; for the parſonage houſe of *Stretham* is intended to be a village: and a pariſh and village are intended all one, if the contrary be not ſhewn. Fourthly, it was moved that the bond was made for Simony, it being to compel him to reſign: *ſed non allocatur*; for it is not Simony, but *good policy to tie him to reſign*; and if it were, it is not material: Wherefore the judgment was affirmed. *Cro. Jac.* 274. *Paſch.* 9 *Jac.* 1.

Bond to reſign after 3 months notice, unlawful. Sir John Paſchal v. Clark.

It was ſaid by the court upon evidence, that if the patron preſent one to the advowſon, having taken an obligation of the preſentee, that he ſhall reſign when the obligee *will*, after three months warning, that is Simony within the 31 *Eliz. c.* 6. *Noy* 22. *Trin.* 15 *Jac.* 1. *C. B. rot.* 2051.

A true copy of the original record in this cauſe, will be inſerted in an APPENDIX.

Bond to reſign upon requeſt, lawful. Babington v. Wood.

Debt upon an obligation conditioned. Whereas the plaintiff intended to preſent the defendant to ſuch a benefice, that if the defendant at any time after his admiſſion, inſtitution, and induction, at the plaintiff's requeſt reſigned the ſaid benefice into the hands of the biſhop of *London*, that then, &c. The defendent upon *oyer* of the condition demurred generally; and this was argued by *Grimſton*, for the petitioner, and by *Calthrop*, for the defendant, who ſhewed, that the cauſe of demurrer was, for that, the condition of the bond being to reſign upon requeſt of the patron, it is Simony, and againſt law; ſo the bond void. But all the court conceived, that if the plaintiff had averred, that the obligation was made to bind him

him to pay such a sum, or to make a lease or other act, which appears in itself to be Simony; then upon such a plea, peradventure, it might have appeared to the court to be Simony, and might have been a question, whether such a bond for Simony should be void? But as it is pleaded by way of demurrer upon the *oyer* of the condition, it doth not appear, that there is any Simony; for such a bond to cause him to resign, *may* be good, and upon good reason and discretion required by the patron, (*viz.*) if he be *non resident*, or takes a second benefice by a qualification or the like, and a precedent was shewn, in *octavo Jacobi*, betwixt *Johnes* and *Lawrence*, where such a bond was made to resign a benefice upon request, when the son of *Johnes* came to be 24 years of age, to the intent, that he might be presented unto it: And it was adjudged good in the *King's Bench*, and affirmed in a writ of error in the *Exchequer Chamber*. And of this opinion was all the court; whereupon judgment was given for the plaintiff. *Cro. Car.* 180. 9 *Car.* 1. *B. R. A. D.* 1633. *Hutt. S. C.* accordingly; and says, that upon error brought in the *Exchequer Chamber*, the judgment was affirmed.—*Jo.* 220. *S. C.* accordingly, and that it was affirmed in error upon viewing the precedent of *Johnes* v. *Lawrence*.

Bond of resignation said to be adjudged good a dozen times. Baker v. Watson.

Error of a judgment in *C. B.* in debt on obligation conditional to resign on request; the defendant after *oyer* pleads resignation, to which the plaintiff replies he did not resign, *et hoc petit quod inquiratur*, to which the defendant demurs, because the condition is void. And 2dly the resignation is triable by certificate, and not *per pais*; Winnington *contra pro* defendant in the writ of error; and *per curiam*, it hath been above a dozen times adjudged, that the condition is good, and they also inclined the resignation should be tried *per pais*, and not by certificate. But *adjornatur*. 2 *Keb.* 446. *Hil.* 20 & 21 *Car.* 2. *B. R.*

The preceding case differently reported.

In debt upon bond conditioned to resign upon request; the defendant pleads, that he did resign according to the condition, which was found against him; and judgment for the plaintiff. The defendant brought a writ of error, because it was a simoniacal condition; but the judgment was affirmed, because the condition is good. *Raym.* 175. *Hil.* 21 & 22 *Car.* 2. *B. R. Watson* v. *Baker*.

———*Sid.* 387. *pl.* 24. *S. C.* but reports, that the defendant pleaded in *C. B. quod resignavit*; to which the plaintiff replied, *non resignavit*; whereupon the defendant demurred generally: And that judgment was given in *C. B.* for the plaintiff upon this single

doubt, *viz.* whether the reſignation here ſhall be tried *per pais* or by certificate? And they held, that it ſhould be tried *per pais*, and that the writ of error was brought hereupon in *B. R.* and that this was the matter inſiſted upon in the writ of error, which he himſelf argued, and there gives his argument, and concludes, that the cauſe was compromiſed, and the court gave no opinion in it. [And in *Sid.* there is nothing mentioned of the point of ſimoniacal condition]——2 *Keb.* 446. *pl.* 12. *Baker* v. *Watſon*, *S. C.* in *B. R.* and reports, that the court held the condition good; and inclined, that the reſignation ſhould be tried *per pais*, and not by certificate. *Sed adjornatur.*

Bond to reſign upon requeſt doubted to be lawful. Grahme v. Grahme.

Upon a motion to diſſolve an injunction granted to ſtay proceedings in an action on a bond given by an incumbent to this patron, that he (the incumbent) ſhould reſign on requeſt, lord *Keeper* [*North*] ſaid, he was not ſatisfied, that ſuch a bond was good in law: The precedents that were in the caſe were not directly to the point, whether ſuch bonds are ſimoniacal or not: He therefore directed that the plaintiff ſhould declare on this bond, and the defendant plead Simony, and after that and judgment at law come back to the court. 1 *Vern.* 131. *Hil.* 1682. *Grahme* v. *Grahme.*

Chancery will prevent an ill uſe being made of ſuch a bond. Durſton v. Sands.

The defendant, patron of a church in *Glouceſterſhire*, took a bond from the plaintiff to reſign upon requeſt. Upon hearing the cauſe, a perpetual injunction was decreed againſt the bond; for the court and all ſides agreed, that the bond was good; yet if the patron made uſe of it to his own advantage, *by detaining tithes*, or the like, the court would relieve againſt the bond; and in this caſe the patron did detain his tithes from the plaintiff, whom he had preſented; *he* in his anſwer *pretended a modus decimandi*, but made no proof of it: and being patron of ſeveral other churches had taken bond from thoſe he had preſented, and made an ill uſe of it. 2 *Chan. Ca.* 186. *Mich.* 2 *Jac.* 2. in *Chan. Durſton* v. *Sands.*——*Vern.* 411. *pl.* 387. *S. C.* accordingly, by reaſon of the *ill uſe the patron made of the bond.*——2 *Chan. Rep.* 398. *S. C.* and adds, that upon the defendant's giving notice to the plaintiff to reſign, the plaintiff did accordingly reſign the rectory into the hands of the biſhop, who refuſed to accept the ſaid reſignation, and ordered the plaintiff to continue to ſerve the cure; declaring, he would never countenance ſuch unjuſt practices; but ordered his regiſter to enter it as an act of court, that the plaintiff had tendered his reſignation, but

Biſhop refuſed to accept reſignation.

that the biſhop had rejected it. And that the defendant inſiſted, that the reaſon of his arreſting the plaintiff on the ſaid bond was his non-reſidence and litigious carriage to the pariſhioners. But a perpetual injunction was awarded.——*S. C.* cited *Chan. Prec.* 513. *pl.* 317. *Paſch.* 1719. in the caſe of *Hawkins* v. *Turner*. In which laſt caſe it was agreed, that a bond given to reſign on requeſt ſhould not be made uſe of to turn out the incumbent, unleſs for non-reſidence or ſome great miſdemeanor; nor would the ordinary accept of a reſignation offered by the incumbent, without ſome ſuch cauſe ſhewn; but if the patron made uſe of the bond *to extort money* from the incumbent, without ſome ſuch cauſe ſhewn, this court would grant an injunction.

Hawkins v. Turner.

Biſhop refuſed to accept &c.

Note; *per Holt* chief juſtice, every contract made for or about any matter or thing which is prohibited and made unlawful by any ſtatute, is a void contract, tho' the ſtatute it ſelf doth not mention that it ſhall be ſo, but only inflicts a penalty on the offender, becauſe a penalty implies a prohibition, tho' there are no prohibitory words in the ſtatute. As for inſtance, in the caſe of Simony, the ſtatute only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the ſimoniacal contract; yet it hath been always held, that ſuch contracts being againſt law are void. *Carth.* 252. *Mich.* 4 *W.& M. B. R.*

Simoniacal contracts always held void Bartlet v. Vinor.

The caſe was debt upon a bond for a *great* ſum of money; the defendant pleaded, that the condition was for a parſon's reſigning his benefice, and on demurrer. And *per Powell* and *Blincow*, being only in court, *jud' pro quer'*. *Powell:* I am of opinion, that when firſt the judges have held theſe bonds good, if they had foreſeen the miſchief of them, they would have been of another opinion; but now that opinion has prevailed, and it is ſupported only by the *poſſibility*, that it *may* be to an honeſt intent; as that the patron may have a ſon of his own, capable of the benefice; or that he ſhould voluntarily reſign in caſe of non-reſidence, which may rather argue care in the patron, than any corruption of Simony; but if theſe were the real motives, why ſhould they not be ſpecially expreſſed in the condition? But ſuch a bond as this is to reſign generally, it may be the parſon could not have the benefice without it, he is thereby tempted to ſtrain a point rather than be without a living, and the common uſe of them is to have the money; and ſure if the thing be Simony, a bond for it will be void. And

Bond for reſignation of a benefice good.

Michief of ſuch bonds. Anon.

my lord *Coke's* notion is not law, where he ſays that ſince the bonds are good, there ſhall be no averment of Simony upon it [2 *Bulſt.* 187.] 31 *El.* makes the church void, and gives the preſentation to the king; and Simony was againſt law before, and ſimoniacal agreements were void before that ſtatute, tho' Simony itſelf was only puniſhed in the ſpiritual court. And he ſaid the caſe of *Gregory* and *Oldbury* (*See p.* 14) was not law, *Moor* 641. where there is an averment of its being a ſimoniacal contract, and the patron and incumbent are privies to it; and if there be any ſimoniacal conſideration, they both muſt know it. And he quoted a caſe, where in action upon ſuch a bond the defendant brought the plaintiff by bill into *Chancery*; and becauſe he could not a give a good account of the *cauſe* of taking ſuch a bond, a perpetual injunction was granted. But here we cannot ſet aſide this bond without a *ſpecial cauſe* ſhewed in pleading, which is not done. *Blincow*: You aſſign no Simony, but put it upon the plaintiff to ſhew none, which he need not do, becauſe we cannot *intend* it to be ſuch, ſince it *may* be otherwiſe; and here is a particular circumſtance why it ſhould not be thought Simony here, becauſe it is in a ſum much above the value of the benefice; if indeed it had been for a ſum of leſs value, it might be intended perhaps the parſon would rather pay it than reſign. And he remembered juſtice *Twiſden* ſaid he had known ſuch a bond held good twelve times; ſo it would be hard to oppoſe it now, there appearing no Simony in the condition, the defendant not averring any. 12 *Mod.* 504. in *C. B. Paſch.* 13 *Wil.* 3. *Anon.*

J. L. Melm. Mſs. R. not. E. P. 5 T. 04 Comm. Law La

Court of Equity will not ſuffer a general bond of reſignation to be put in ſuit without ſome ſpecial good reaſon. Hilliard v. Stapleton.

J. L. Melm. Mſs. E. 19.

The guardian of an infant preſented to a living, and took a bond from the incumbent to reſign within two months after requeſt of the patron or his heirs, *it being deſigned that he ſhould have the living himſelf when capable.* The patron afterwards died an infant at the Univerſity, leaving two ſiſters his heirs, who preſſed the incumbent to reſign, and for not doing it, put the bond in ſuit and recovered judgment; and this bill was brought to be relieved againſt the bond and judgment. And it was proved in the cauſe, that they had treated with the incumbent to ſell him the perpetual advowſon; and had ſaid, that if he would not give 700 l. for it, they would make him reſign. Lord Keeper ſaid, the proof in this caſe lies on the defendants part, and unleſs they make out ſome good reaſon for removing him, he ſhould certainly decree againſt the bond. Bonds for reſignation have been held good in law. The ſtatute of 31 *Eliz.* againſt Simony made

made the penalty upon the lay patron; and he did not remember any caſe of reſignation bonds before that ſtatute, and they have been allowed ſince only to preſerve the living for the patron himſelf, or for a child, or to reſtrain the incumbent from non-reſidence, or a vicious courſe of life; and if any other advantage be made thereof, it will avoid the bond; and where it is general, for reſignation; yet ſome ſpecial reaſon muſt be ſhewn to require a reſignation, or he would not ſuffer it to be put in ſuit. If it ſhould not be ſo, Simony will be committed without proof or puniſhment. A particular agreement muſt be proved to reſign for the benefit of a friend that would be preſented, and without ſuch agreement the bond ought not to be ſued, but for miſbehaviour of the parſon; and here are proofs in this caſe of endeavours to get money out of the plaintiff, and decreed a perpetual injunction againſt the bond, and ſatisfaction to be acknowledged upon the judgment; and the plaintiff to give a new bond of 200 l. penalty to reſign; but that not to be ſued without leave of the court. *Abr. Eq. Ca.* 86. *pl.* 3. *Mich.* 1701. *Hilliard* v. *Stapleton.*

Proof of miſbehaviour makes bond good. Hodgſon v. Thornton.

The defendant, on preſenting the plaintiff to a living, took a bond from him to reſign, and after put it in ſuit and recovered, and levied 98 l, and the plaintiff's bill was for relief. The defendant did not by anſwer pretend any miſbehaviour, yet examined to ſeveral miſbehaviours. And it was urged, that theſe depoſitions could not be read, becauſe thoſe miſbehaviours were not in iſſue; and ſo inclined my Lord Keeper, but after allowed them to be read, and founded his decree upon them. *Abr. Eq. Ca.* 228. *Hil.* 1702.

A worthy man will not give a bond of reſignation. Swain v. Carter.

A reſignation bond comes as near Simony as can be; for it is eaſy to ſecure a round ſum by ſuch a bond. I do not approve the giving or taking it, and a worthy man will not give it; *per Holt*, Ch. J. *Comb.* 394. *Mich.* 8 *W.* 3. *B. R.*

Court of Equity will not permit an ill uſe to be made of a bond of reſignation. Peele v. Capel.

Capel, on preſenting *Peele* to a living, took a bond from him to reſign when the patron's nephew came of age, for whom the living was deſigned. When the nephew was of age, inſtead of requiring a reſignation, it was agreed between them all, that *Peele* ſhould continue to hold the living, paying 30 l. *per ann.* to the nephew. *Peele* makes the payment for ſeven years, but refuſing to pay any more, the patron puts the bond in ſuit: and then *Peele* comes into this court for an injunction, and to have back his 30 l. *per ann.* On the hearing the Chancellor

granted the injunction, not (as he ſaid) upon account of any defect in the bond itſelf, which he held good, but on account of the ill uſe that had been made of it; and as to the money, it being paid upon a ſimoniacal contract, he left the plaintiff to go to law for it. *Stran.* 534. 9 *Geo.* 1.

Bond of reſignation good. Peele v. Earl of Carliſle.

Debt on bond, conditioned to reſign a benefice. And the court refuſed to let the defendant's counſel argue the validity of ſuch bonds, they having been ſo often eſtabliſhed, even in a court of *Equity*. And alſo where the condition is general, and not barely to reſign to a particular perſon. *Stran.* 227. *Mich.* 6 *Geo.* 1.

Bond to reſign a living upon requeſt valid. Wyndham v. Bowen.

In an action of debt upon a bond, the condition of which was, that the defendant ſhould reſign a living upon requeſt; the plaintiff declared, as adminiſtrator with the will annexed of *Catharine Wyndham*; and alledged that the two perſons appointed executors by her will were both dead. Upon demurrer to this declaration, it was holden to be good. And by *Ryder*, Ch. J. The counſel for the defendant did begin to argue againſt the validity of this bond; but as it hath been frequently holden, that a bond to reſign a living upon requeſt is valid, it was improper for the court to permit that point to be argued. *Sayer* 141. *Trin.* 28 *Geo.* 2. 1754.

Bond to reſign on requeſt lawful.—Parſon bound in a bond to reſign a living muſt procure the Biſhop's acceptance of the reſignation. Heſketh v. Gray.

An action of debt being brought upon a bond in the penalty of 5000 l. and *oyer* being prayed of the bond, it appeared from a recital therein; that *Robert Heſketh*, the plaintiff, had preſented *John Gray*, the defendant, to the vicarage of *Steyning* in the county of *Suſſex*; and that it was agreed betwixt them, that the ſaid *John* ſhould, within three months after the expiration of ſix years, to commence from the day of the date of the bond, at the requeſt of the ſaid *Robert*, his heirs, executors, adminiſtrators, or aſſigns, reſign and deliver up the ſaid vicarage into the hands of the proper ordinary, ſo that it may become vacant, and the ſaid *Robert*, his heirs, executors, adminiſtrators, or aſſigns, may preſent anew. It likewiſe appeared; that the condition of the bond was; that if the ſaid *John* ſhall, within three months after the expiration of ſix years, to commence from the day of the date of the bond, at the requeſt of the ſaid *Robert*, his heirs, executors, adminiſtrators, or aſſigns, reſign and deliver up the ſaid vicarage into the hands of the proper ordinary, whereby it may become vacant, and the ſaid *Robert*, his heirs, executors, adminiſtrators, or aſſigns may preſent anew, then the obligation to be void.

The

The defendant pleaded; that he did, within three months after the expiration of the ſix years mentioned in the condition of the bond, at the requeſt of the ſaid *Robert*, offer to reſign and deliver up into the hands of *Matthias*, Lord Biſhop of *Chicheſter*, who was the proper ordinary, the ſaid vicarage, for the ſaid ordinary to accept the ſame, whereby the ſaid vicarage might become vacant, and the ſaid *Robert* might preſent anew; and that the ſaid ordinary did then refuſe, and from thenceforth hitherto had refuſed to accept ſuch reſignation. Upon a demurrer to this plea, it was holden to be bad; becauſe it is not therein averred, that the Biſhop accepted the reſignation. And by *Ryder*, Ch. J.—The defendant, by undertaking to reſign, ſo that the vicarage may become vacant, and the plaintiff may preſent anew, has undertaken for the Biſhop's acceptance of a reſignation; which, according to what is laid down in *Fane*'s caſe, *Cro. Jac.* 198. is neceſſary to the completion of a reſignation. Several caſes have been cited, in which it has been holden; that if a third perſon, who is a truſtee for the obligee, refuſe to do an act, for the doing of which the obligor has undertaken, the penalty of the bond is ſaved; and in order to bring the preſent caſe within the reaſon of thoſe caſes, it has been ſaid; that the Biſhop is to be conſidered as a truſtee for the obligee. If the Biſhop were a truſtee for the obligee, it would be in the obligee's power to compel him to accept a reſignation; it being always in the power of a *ceſtui que truſt* to compel his truſtee to execute the truſt: But it is not, in the preſent caſe, in the power of the obligee to do this; and conſequently, the Biſhop is not to be conſidered as a truſtee for the obligee. We are of opinion, that the Biſhop is, in the preſent caſe, a ſtranger to the obligee; and if this be ſo, it was incumbent upon the obligor to procure his acceptance of a reſignation. In 1 *Roll. Abr.* 452. 5 *Rep.* 23. and 1 *Saund.* 216. it is laid down; that if the obligor undertake for the act of a third perſon, who is a ſtranger to the obligee, it is incumbent upon the obligor to procure the act to be done; unleſs there were at the time of entering into the bond an impoſſibility of doing the act, or unleſs the doing thereof has been ſince rendered impoſſible by the act of God, or by the act of law. *Sayer* 185. *Hil.* 28 *Geo.* 2. 1755. *B. R.*

Another report of the preceding caſe.

Debt upon a bond. Upon oyer of the condition it appeared that the obligor had been preſented to the living

of *Staining* by the obligee, and had agreed to deliver it up into the hands of the ordinary, within three months after the expiration of five years, at the requeſt of the plaintiff his heirs or aſſigns, or upon proper notice in writing, ſo that a new preſentation might be made. And after this recital of the agreement, the condition was, that if the defendant did deliver up into the hands of the ordinary, the ſaid living, ſo as that the ſame might become void, then the obligation to be void. The defendant pleaded, that he did offer to reſign abſolutely the living, and that he delivered the reſignation to the ordinary that he might accept the ſame and the plaintiff make a new preſentation, but that the ordinary refuſed to accept it. He pleaded further, that the agreement was corrupt; and that the bond was taken to keep the defendant in awe, and therefore alſo corrupt and void. *Ryder*, Ch. J. delivered the reſolution of the court: The averring in the plea, that the agreement was corrupt, will not make it ſo; but it ſhould be ſet forth, what ſort of corruption, that the court may judge whether ſimoniacal or not. As to the point whether a general bond of reſignation is good, we are all of opinion, it is. It was determined in the caſe of Lord *Carliſle* and *Peele*. But every ſimoniacal contract is void, where it is ſecured only by promiſe. Otherwiſe it is when a bond is given for the performance of ſuch a contract, when the condition doth not expreſs the agreement, but is only a condition for payment of money, becauſe we cannot go out of the written condition to vacate the obligation, and alſo becauſe a ſpecialty does not want a conſideration to ſupport it, as a promiſe depending only upon ſimple contract does. It has been objected, that theſe kind of bonds, when the contract appears upon the face of the condition to be for a general reſignation upon requeſt, are void: Indeed it does *look ſo*, but the *law is otherwiſe*. And as to the other objection, we are all of opinion that the plea in bar is bad, becauſe it is not averred that the Biſhop has accepted this reſignation, and for theſe reaſons; 1. Becauſe, without the acceptance of the ordinary, the reſignation is not compleat, and the patron can have no benefit of ſuch a reſignation. 2. Becauſe the defendant has undertaken for the acceptance of the Biſhop, as that is neceſſary to make a compleat reſignation, which he has by the condition of his bond agreed to do. 3. Becauſe the plea does not contain a ſufficient excuſe for the Biſhop's *non-acceptance* of the reſignation; for the defendant has undertaken that the Biſhop ſhall do it, or if he does not

not, he will make a ſatisfaction, by paying money or the like to the party who is injured thereby; and this is reaſonable, and is the law in ſuch caſes when the obligor undertakes for the act of a ſtranger. The ordinary is a judicial officer, and is intruſted with a judicial power to accept or refuſe reſignations as he thinks proper. And judgment was given for the plaintiff.—But it appearing that the patron had adverti ſed the living to be ſold, and, in treating with a purchaſer for it, that he had declared he aſked and expected a greater price for it, as he could compel an immediate reſignation: Lord *Hardwicke* for this reaſon, and as it was making a bad uſe of the bond, granted an injunction to reſtrain the patron from proceeding further upon the bond. 3 *Burn's Eccleſiaſt. Law*, tit *Simony*.

Covenant that incumbent ſhould by all lawful means reſign upon requeſt is ſimoniacal. Pyke v. Pulleyn.

T. P. vicar of *S.* covenanted to permit the defendant to receive to his own uſe the tithes and dues of his vicarage for one year, and to make a grant thereof, upon requeſt to the defendant for his life, *&c.* and that at the requeſt of the defendant he would by all lawful means ſurrender the ſaid vicarage, ſo as the defendant might preſent; and the ſaid defendant covenanted to pay the plaintiff 150 l. for and in lieu of the ſaid tithes, *&c.* and avers, that *T. P.* had performed all on his part, but that the defendant had not paid the 150 l. The defendant pleaded in bar to this action, that *T. P.* died at *S.* within the year, ſo that the defendant could not take the tithes for a year according to the agreement. Upon a demurrer it was inſiſted *(inter alia)* for the plaintiff, that the covenant is, that the ſaid *T. P.* by all lawful means ſhould reſign upon requeſt of the defendant, which in effect is all one as if he had ſaid, that *T. P.* ſhould reſign, if by lawful means he might, ſo that no reſignation was to be unleſs it might be by lawful means; but that had thoſe words been omitted the contract had not been ſimoniacal; for payment of the 150 l. is a diſtinct and independent covenant; and the caſe of *Byrt.* v. *Manning*, *Cro. Car.* 425. was cited as a caſe in point. And the plaintiff had judgment by the opinion of the whole court. *Lutw.* 343. *Trin.* 5 *W. & M.*

Bond for procuring a marriage, void. Hall et al. v. Potter.

T. gave bond to *P.* to pay him 500l. within 3 months after he ſhould be married to the lady *Ogle*, a widow of great fortune and honour, *&c.* Debt was brought againſt *T.*'s executors, and upon trial before Ld. Ch. J. *Holt*, the plaintiff had a verdict. Afterwards a bill in *Chancery* was brought by the defendant, ſuggeſting that the contract was void, it being for procuring the ſaid mar-

marriage, ſhe being a perſon of ſo great honour and fortune; and that nothing was done by *P.* but adviſing *T.* to apply himſelf to one *Brett*, who had a great intereſt with the lady, and ſome ſmall matter expended in entertaining *T.* and ſo no ſufficient conſideration for this bond; or if it was, yet ſuch contracts for procuring a marriage are of dangerous conſequence, and ſeveral precedents were produced, but in all theſe there appeared ſome circumventions; but the defendant anſwered, that no ſuch was uſed in this caſe; that here was nothing but advice; and that in this caſe the marriage was ſuitable in reſpect both of birth and fortune; and a caſe was cited between *Foſter* and *Ramſey*, tried before *Holt* Ch. J. where the defendant promiſed the plaintiff 50 l. if he would procure *Ramſey* a widow to marry him, and the plaintiff recovered the 50 l. in damages, and there being no fraud or circumvention in the caſe, no doubt was made of the legality of the contract. And of that opinion was the Lord Keeper in this caſe, and upon a rehearing diſcharged an order made by the Maſter of the Rolls to the contrary, and diſmiſſed the plaintiff's bill. Whereupon on appeal to the Houſe of Lords, and hearing the cauſe there, all the Lords but three or four were of opinion that all ſuch contracts are of dangerous conſequence, and the decree of diſmiſſion was reverſed, and the bond to be void. 3 *Lev.* 411. 6 *W.* 3. *C. B. Hall et al.* v. *Potter*. *Show. Parl. Ca.* 76.

CHAP. V.

Adjudications relative to the legality of purchaſing the next *preſentation to a benefice.*

THE buying of the next preſentation to a church when it is full, with intent to preſent a *certain perſon* when it ſhall become void, and the preſenting of that perſon, is an offence within the meaning of the ſtatute. *Lane* 102. *Kitchin* v. *Calvert*. *Noy* 25. *Winchcomb* v. *Pulleſton*.

It was cited to be adjudged, that if a man purchaſe the next avoidance of a church, with an intent to preſent his ſon, and afterwards he preſent him, that it is Simony within the ſtatute of 31 *Eliz.* *Godbolt*. 390, 435.

Notwithſtanding the determinations, that if a perſon purchaſed the next preſentation to a benefice, when full, with deſign to preſent a certain perſon, and did preſent him,

him, it was Simony, it became a doubt, whether it was ſo for a clerk himſelf to purchaſe for himſelf the next turn in a living? To remove this doubt, the following act was made:

Statute 12 *Ann. St.* 2. *C.* 12. [*A. D.* 1714.] Intituled, an act for the better maintenance of curates within the church of *England*; and *for preventing any eccleſiaſtical perſons from buying the next avoidance of any church-preferment.*

By the firſt ſection of this act the biſhop or ordinary is to appoint a ſtipend to curates, not exceeding 50 l. *per annum*, nor leſs than 20 l. and on neglect of payment, may ſequeſter the profits of the benefice.

Penalty of taking for any ſum of money, &c. the next avoidance, &c.

Sect. 2d. And whereas ſome of the clergy have procured preferments for themſelves, by buying eccleſiaſtical livings, and others have been thereby diſcouraged; be it further enacted by the authority aforeſaid, That if any perſon, from and after the twenty-ninth day of *September*, one thouſand ſeven hundred and fourteen, ſhall or do, for any ſum of money, reward, gift, profit or advantage, directly or indirectly, or for or by reaſon of any promiſe, agreement, grant, bond, covenant or other aſſurance, of or for any ſum of money, reward, gift, profit, or benefit whatſoever, directly or indirectly, in his own name, or in the name of any other perſon or perſons, take, procure, or accept the next avoidance of, or preſentation to any benefice with cure of ſouls, dignity, prebend, or living eccleſiaſtical, and ſhall be preſented, or collated thereupon, that then every ſuch preſentation or collation, and every admiſſion, inſtitution, inveſtiture and induction upon the ſame, ſhall be utterly void, fruſtrate, and of no effect in law, and ſuch agreement ſhall be deemed and taken to be a ſimoniacal contract; and that it ſhall and may be lawful to and for the Queen's majeſty, her heirs and ſucceſſors, to preſent or collate unto, or give or beſtow every ſuch benefice, dignity, prebend, and living eccleſiaſtical, for that one time or turn only; and the perſon ſo corruptly taking, procuring, or accepting any ſuch benefice, dignity, prebend, or living, ſhall thereupon, and from thenceforth, be adjudged a diſabled perſon in law to have and enjoy the ſame benefice, dignity, prebend, or living eccleſiaſtical, and ſhall alſo be ſubject to any puniſhment, pain or penalty, limited, preſcribed or inflicted by the laws eccleſiaſtical, in like manner as if ſuch corrupt agreement had been made after ſuch benefice, dignity, prebend, or living eccleſiaſtical had become vacant;

vacant; any law or ſtatute to the contrary in any wiſe notwithſtanding.

Purchaſe of the next avoidance when the incumbent is ready to die, is Simony. Sheldon v. Bret.

In a *quare impedit*, between one *Sheldon* and *Bret*, *Hutton* ſaid, that we in *Chancery* have adjudged, that the grant of the next avoidance for money when the parſon was ſick in his bed ready to die, is Simony, for the ſtatute is, if the contract be made *directly*, or *indirectly*, by any ways or means. *Winch.* 63. *Hil.* 20 *Jac.* 1. *C. P.*

Purchaſe of next preſentation, by the father in preſence of his ſon, when the incumbent is ſick, is not Simony. Smith v. Shelborn.

Prohibition. The caſe was, a parſon being ſick, the father of *Smith* came with his ſon to the patron, and contracted with the patron in the preſence of his ſon, for the next avoidance of the church, and agreed to give unto him for it 100 l. who thereupon made a grant unto him of the next avoidance accordingly. The parſon dies, the father preſents his ſon, who was admitted, inſtituted, and inducted, and now was ſued in the ſpiritual court, to be deprived for Simony upon this cauſe, and *Smith* brought a prohibition, alledging therein the general pardon of 35 *Eliz.* which was after this preſentation, admiſſion, inſtitution, and induction, wherein *Simony* is not excepted: And it was thereupon demurred, and after argument at the bar reſolved, that the prohibition well lay; and firſt the whole court reſolved, that, although the general pardon diſcharged the puniſhment for *Simony*, yet, if the parſon comes in by *Simony*, it is examinable by the ordinary: For he ought to provide, that the church be not ſerved with corrupt perſons; and, if he finds *Simony* in any, he may well deprive him for that cauſe. And that made, that the church was never full of him, and made him no parſon, *ab initio*. And the pardon doth not enable him to retain it. But all the juſtices, beſides *Anderſon*, held, that in this caſe there is not any Simony: For the father might buy the advowſon, and preſent his ſon. And it is not Simony in any to buy an advowſon. And, although the ſon here was privy thereto, yet it is not material: for it being no offence in the father, who was the principal, it cannot be an offence in the ſon, who was but acceſſary; for there cannot be a *particeps criminis*, where there was not any crime committed. But if the parſon himſelf had contracted for a benefice, to the intent another ſhould preſent him, that is Simony. But the father is bound by nature to provide for his ſon; and therefore his buying an advowſon, with an intent to provide for him, is not any Simony; therefore the prohibition is well granted: otherwiſe, under colour thereof, every preſentment might be drawn into queſtion in the ſpiritual court. But *Anderſon* held that the conſultation ſhould be granted in this

this caſe, becauſe this contract by the father, with an intent to preſent his ſon, being in preſence, and with the ſon's privity, made it Simony in him, and he is deprivable: And, although the law is, that if ſuch a ſimoniacal contract be proved, and the incumbent be deprived, that the church is *quaſi* always void: And that there ſhall be a preſentment by *lapſe* to the Queen; yet that doth not make the right of patronage to come into queſtion; becauſe the deprivation ariſeth from the patron's offence. Wherefore, *&c.* But if in this caſe the father had bought the benefice, with an intent to preſent the ſon, if it were without the privity and conſent of the ſon, it had not been any Simony. Wherefore, as the caſe here is, he held it to be Simony, and the conſulation grantable. But, notwithſtanding, the other three juſtices being againſt him, it was adjudged that the prohibition ſhould ſtand. *Cro. Eliz.* 685. *Paſch.* 41 *Eliz.*

The doctrine laid down in this caſe has been ſince contradicted in the following caſe, nor does the reaſon given in the preceding adjudication, that a father is bound by nature to provide for his ſon, hold. For if the purchaſe of a living when full with intent to preſent any certain perſon is, as has been held, within the ſtatute, how can it be lawful, as the words of the ſtatute are general, for a father to do it. A parent is by nature bound to provide for his ſon; but this obligation can never extend to the doing things prohibited by law. This way of reaſoning would make all Simony lawful; for, as every man is as much, if not more, bound by the law of nature to provide for himſelf as his father is for him, every man might purchaſe a living for himſelf.

Extracted from an extract in Vin. Simony (L) from Dr. Watson cap. 5.

Benedict Winchcombe brought a *quare impedit* againſt the biſhop of *Wincheſter* and *Richard Pulleſton*; and the caſe was this, that one *William Waller* being ſeiſed of the church of *Leckford*, and *Watton* being incumbent of it, and a man grievouſly pained with the ſtrangurie, and like every day to die, *Say* bargained with *Waller* for 90 l. that he ſhould preſent, or cauſe him to be preſented whenſoever the other died, and for the better and ſure effecting thereof, it was agreed between them that *Waller* ſhould grant the next avoidance unto one *John Ebden*, a ſpecial friend of *Say*'s, upon confidence, *&c.* which was done accordingly. Then *Watton* the incumbent died, and *Ebden*, in execution of the ſimoniacal agreement aforeſaid, preſented *Say*, who was admitted, *&c.* and then *Waller* granted the manor and the advowſon to *Winchcombe* the plaintiff for years; *Say* died, the King preſents *Pulleſton*, who is admitted,

To contract for the next repreſentation, while the incumbent is ſick, and like to die, is Simony. Winchcombe v. Biſhop of Wincheſter, and Puleſton.

mitted, &c. and *Winchcombe* brings the *quare impedit* againſt the biſhop of *Wincheſter* and him, who pleaded all the matter of Simony aforeſaid, as parſon *imparſonee*, whereupon iſſue was taken and found for him. The queſtion made by the plaintiff in arreſt of judgment was, whether the King or *Winchcombe* have the right to this preſentation which depends wholly upon this, whether the king's turn growing by reaſon of the Simony, be ſatisfied by the preſentation, &c. and death of *Say*, that came in by the Simony. This caſe, ſays lord *Hobart*, after divers arguments at the bar *pro & contra*, was argued by us at the bench openly and at large, and we all four agreed, that judgment was to be given for the defendant, that is to ſay for the King's title by the Simony: And *Hutton*, this *Trinity* term, being come newly to the bench, having been before for the plaintiff, was of opinion with us, and ſo argued. *Hob.* 165. *Paſch.* 14 *Jac.* 1.

A caſe out of Chancery.

Trin. 2. Car. Rot. R. 1552.

On the purchaſe of an advowſon in fee, the incumbent being *in extremis*, but without any privity of the clerk; the next preſentation is not void as being upon a ſimoniacal contract.

Barret and another. v. Glubbe and another.

The plaintiff *Barret* having notice that *Charles Morgan*, clerk, then incumbent of the rectory of *Higham* in the county of *Somerſet* (which is a rectory with cure of ſouls) was on his death-bed, and that it was uncertain whether he ſhould live over the night, purchaſed the advowſon of the defendants *Glubbe* and *Rolle*; the incumbent died the next day, and the purchaſer preſented the plaintiff *Reynell* as his clerk, upon that avoidance. *Qu.* Whether the ſaid preſentation be void, as being on a ſimoniacal contract?

Hill for the plaintiff argued that this was no Simony, being the ſale of an advowſon in fee, and before an actual vacancy. That Simony is properly defined a preſentation in reſpect of reward. *God. Rep. Can. c.* 39. *ſect.* 1. which is not the preſent caſe. That the ſtatutes of Simony being penal, and reſtrictive of the common law, ought therefore to be conſtrued ſtrictly. That fraud or Simony ought not to be preſumed or intended. 1 *Roll. Abr.* 523, 4. *Cro. Car.* 425. If this ſale be void, all ſales that are concluded when the incumbent is *in extremis* are ſo likewiſe; and one may ſuppoſe many caſes where that would be unjuſt and abſurd.

Glyn for the defendants inſiſted, that the common law, previous to any ſtatute, took notice of corrupt preſentations, as contracts *ex turpi cauſâ*. That no profit was allowed to be made of a right of patronage, and therefore a guardian in ſocage was not accountable for it. In *Watſon*

Cl.

Cl. Law, 33, 34, 35, all the caſes of Simony are taken notice of. And it appears, that any purchaſe made, with an intent to preſent any particular perſon, is ſimoniacal. And the laws againſt Simony, when they merely vacate the preſentation, are conſidered as remedial, and conſtrued largely;—when they inflict a forfeiture, are looked upon as penal, and conſtrued ſtrictly.

De Grey Ch. J. I am not able to doubt upon this queſtion. An advowſon is a temporal right; not indeed *jus habendi* but *jus diſponendi.* The exerciſe of that right is by preſentation. The right itſelf is a valuable right; and therefore an advowſon is held to be aſſets in caſe of lineal warranty. *Doddr.* 2. 23. It is real aſſets in the hands of the heir. *Robinſon* and *Tonge*, *Dom. Proc.* 1730. And the truſtee, or mortgagee of an advowſon are bound to preſent the clerk of the *ceſtuique truſt* or mortgagor. Thus far it is a valuable right, and properly the object of ſale.

But the exerciſe of this right is a public truſt, and therefore ought to be void of any pecuniary conſideration either in the patron or preſentee. It cannot, it ought not to produce any profit. It is not veſted in guardian in ſocage; nor is he accountable for any preſentation made during the infancy of his ward. It is held in *Hob.* 304. that an advowſon will not paſs by the words commodities, emoluments, profits, and advantages. In *quare impedit*, the patron could, at common law, recover no damages. In writ of right of advowſon he muſt lay the eſplees in the parſon.

Simony, as ſuch, was unknown to the common law; though I agree with my brother *Glyn* that corrupt preſentation was. *Burnett's Paſt. Care*, 22. But what is or what is not Simony now depends on the ſtat. of 31 *Eliz.* *c.* 6. which did not adopt all the wild notions of the canon law; but has *defined* it to be a corrupt agreement to preſent. In *Co. Entries* 516 it is expreſſed *ſimoniace & corrupte*; but the latter is the legal and effective word.

No conveyance of an advowſon can be affected by this act, unleſs ſo far as it affects the immediate preſentation. And therefore a ſale of an advowſon, the church being actually void, is ſimoniacal, and void in reſpect to the preſent vacancy. 3 *Lev.* 116. *Skin.* 90. In *Wolferſtan* and Biſhop of *Lincoln*. *Burr.* 1510. It is an inaccuracy in the *Reporter* to ſay, that the court held it was abſolutely a void grant.

But it has never been thought, that the purchaſe of an advowſon merely with a proſpect (however probable) that the

the church would ſoon become void, was either corrupt or ſimoniacal: though by common law, if a clerk, or a ſtranger with the privity of a clerk, contracts for the next avoidance, the incumbent being *in extremis*, it was held to be ſimoniacal. *Hob.* 165. *Cro. Eliz.* 685. *Moor*, 916. *Winch.* 63. And now the ſtatute of *Anne* hath diſabled any clerk to purchaſe any next preſentation.

The preſent caſe is the purchaſe of an advowſon in fee. No privity of the clerk appears, the church is not actually void, but in great probability of a vacany; which however by no means is equivalent to a certainty. We ſhould go beyond every reſolution of our predeceſſors, to determine this to be Simony. Suppoſe this had been the purchaſe of a manor with the advowſon appendant, and the incumbent lying *in extremis*. What muſt be done, if the preſent caſe be Simony? Muſt we have declared the appendancy to be ſevered, or that the whole manor was purchaſed corruptly for the ſake of the advowſon?

Gould juſtice of the ſame opinion.

Blackſtone juſtice of the ſame opinion. I was counſel in *Wolſerſton*'s caſe, and have a very full note of it. But not a hint of any opinion by the court that ſuch grant of an advowſon is void.

Nares juſtice of the ſame opinion.

The certificate to *Chancery* was in theſe words:

"We have heard counſel on both ſides, and conſi-
"dered this caſe; and are of opinion the preſen-
"tation is not void, it not appearing to us to have
"been made upon a ſimoniacal contract."

2 Black. Rep. 1052. Hill 16 G. 3

12th of February, 1776.

W. De Grey.
H. Gould.
W. Blackſtone.
G. Nares.

CHAP. VI.

The diſabilities, forfeitures, and puniſhments incurred for Simony by the incumbent, patron, and ordinary.

THE perſon promoted in purſuance of a corrupt contract is either *Simoniacus*, or *ſimoniace promotus* (ſee p. 1). In the former caſe, being party or privy to it, he is liable to ſuffer more: But in the latter caſe, although quite a ſtranger to the contract, he is in a certain degree involved in the conſequences of it. The deſign, as in many other caſes is, that if a ſenſe of what becomes themſelves

ſelves and of the duty they owe the publick, will not reſtrain men from being guilty of an offence, ſo pregnant with miſchief, a regard to thoſe they mean to ſerve may do it.

Doderidge juſtice ſaid, that before the ſtatute 31 *Eliz.* by the common law *Simoniacus* was perpetually diſabled to take any benefice, but one inſtituted *ſimoniace* was diſabled only as to the ſame church: but that now by the ſtatute it is all one in both caſes; for in both caſes he ſhall be perpetually diſabled; and that this was reſolved in the *Exchequer*, by reaſon of the generality of the words in the ſtatute; *quod fuit conceſſum per Coke. 1 Roll. Rep. 237. ibid.* The reporter makes a remark that it ſeems they intend that he is perpetually diſabled as to this advowſon; for the ſtatute is ſo. *See page 5.*

Simoniacus, and Simoniace promotus diſabled. The King v. Biſhop of Norwich, Cole and Saker.

In like manner the *Simoniacus* ſhall forfeit double the value of one year's profit of the benefice he is preſented to: But the *Simoniace promotus* is not liable to any forfeiture on this account.

31 Eliz. c. 6. ſect. 5. ſee page 5.

The double value, which is by this ſtatute forfeited, is to be the double value of what the benefice can be let for, and not the double value, as valued in the king's books.

3 Inſt. 154.

Neither the *Simoniacus*, nor the *Simoniace promotus*, can ſue for tithes, the right of them being by the corrupt contract taken away.

March. 84.

If an incumbent takes a ſum of money for the reſigning or exchanging any benefice with cure of ſouls, he is to forfeit double the value of the money ſo taken. *See page 6.*

31 Eliz. c. 6. ſect. 8.

Every perſon corruptly obtaining orders, although he is not privy to the giving money for the procuring ſuch orders, is liable to forfeit ten pounds, and all the preferments he accepts within ſeven years after his being ſo ordained. *See page 6.*

31 Eliz. c. 6. ſect. 10.

The diſabilities incurred by this offence cannot be diſpenſed with by *non obſtante*, for when any thing is for the good of the church or ſtate prohibited by ſtatute, the king's ſubjects have an intereſt in it, and the king can no more diſpenſe with it, than he can with the common law; but where a thing is prohibited and a penalty given to the king, or to the king and an informer, the king may diſpenſe with the penalty.

3 Inſt. 154. 2 Hawk. 396.

Simony is not pardoned by a general pardon.

Sid. 170.

Beſides theſe forfeitures and diſabilities, the *Simoniacus*, provided he has taken the oath againſt Simony, is alſo liable to be indicted and puniſhed as in other caſes of perjury; and accordingly,

the church would ſoon become void, was either corrupt or ſimoniacal: though by common law, if a clerk, or a ſtranger with the privity of a clerk, contracts for the next avoidance, the incumbent being *in extremis*, it was held to be ſimoniacal. *Hob.* 165. *Cro. Eliz.* 685. *Moor*, 916. *Winch.* 63. And now the ſtatute of *Anne* hath diſabled any clerk to purchaſe any next preſentation.

The preſent caſe is the purchaſe of an advowſon in fee. No privity of the clerk appears, the church is not actually void, but in great probability of a vacany; which however by no means is equivalent to a certainty. We ſhould go beyond every reſolution of our predeceſſors, to determine this to be Simony. Suppoſe this had been the purchaſe of a manor with the advowſon appendant, and the incumbent lying *in extremis*. What muſt be done, if the preſent caſe be Simony? Muſt we have declared the appendancy to be ſevered, or that the whole manor was purchaſed corruptly for the ſake of the advowſon?

Gould juſtice of the ſame opinion.

Blackſtone juſtice of the ſame opinion. I was counſel in *Wolferſton*'s caſe, and have a very full note of it. But not a hint of any opinion by the court that ſuch grant of an advowſon is void.

Nares juſtice of the ſame opinion.

The certificate to *Chancery* was in theſe words:

"We have heard counſel on both ſides, and conſi-
"dered this caſe; and are of opinion the preſen-
"tation is not void, it not appearing to us to have
"been made upon a ſimoniacal contract."

2 Black. Rep. 1052. Hill 16 G. 3

12th of February, 1776.

W. De Grey.
H. Gould.
W. Blackſtone.
G. Nares.

CHAP. VI.

The diſabilities, forfeitures, and puniſhments incurred for Simony by the incumbent, patron, and ordinary.

THE perſon promoted in purſuance of a corrupt contract is either *Simoniacus*, or *ſimoniace promotus* (ſee p. 1). In the former caſe, being party or privy to it, he is liable to ſuffer more: But in the latter caſe, although quite a ſtranger to the contract, he is in a certain degree involved in the conſequences of it. The deſign, as in many other caſes is, that if a ſenſe of what becomes themſelves

ſelves and of the duty they owe the publick, will not reſtrain men from being guilty of an offence, ſo pregnant with miſchief, a regard to thoſe they mean to ſerve may do it.

Doderidge juſtice ſaid, that before the ſtatute 31 *Eliz.* by the common law *Simoniacus* was perpetually diſabled to take any benefice, but one inſtituted *ſimoniace* was diſabled only as to the ſame church: but that now by the ſtatute it is all one in both caſes; for in both caſes he ſhall be perpetually diſabled; and that this was reſolved in the *Exchequer*, by reaſon of the generality of the words in the ſtatute; *quod fuit conceſſum per Coke.* 1 *Roll. Rep.* 237. *ibid.* The reporter makes a remark that it ſeems they intend that he is perpetually diſabled as to this advowſon; for the ſtatute is ſo. *See page* 5. Simoniacus, and Simoniace promotus diſabled. The King v. Biſhop of Norwich, Cole and Saker.

In like manner the *Simoniacus* ſhall forfeit double the value of one year's profit of the benefice he is preſented to: But the *Simoniace promotus* is not liable to any forfeiture on this account. 31 Eliz. c. 6. ſect. 5. ſee page 5.

The double value, which is by this ſtatute forfeited, is to be the double value of what the benefice can be let for, and not the double value, as valued in the king's books. 3 Inſt. 154.

Neither the *Simoniacus*, nor the *Simoniace promotus*, can ſue for tithes, the right of them being by the corrupt contract taken away. March. 84.

If an incumbent takes a ſum of money for the reſigning or exchanging any benefice with cure of ſouls, he is to forfeit double the value of the money ſo taken. *See page* 6. 31 Eliz. c. 6. ſect 5.

Every perſon corruptly obtaining orders, although he is not privy to the giving money for the procuring ſuch orders, is liable to forfeit ten pounds, and all the preferments he accepts within ſeven years after his being ſo ordained. *See page* 6. 31 Eliz. c. 6. ſect. 10.

The diſabilities incurred by this offence cannot be diſpenſed with by *non obſtante*, for when any thing is for the good of the church or ſtate prohibited by ſtatute, the king's ſubjects have an intereſt in it, and the king can no more diſpenſe with it, than he can with the common law; but where a thing is prohibited and a penalty given to the king, or to the king and an informer, the king may diſpenſe with the penalty. 3 Inſt. 154. 2 Hawk. 396.

Simony is not pardoned by a general pardon. Sid. 170.

Beſides theſe forfeitures and diſabilities, the *Simoniacus*, provided he has taken the oath againſt Simony, is alſo liable to be indicted and puniſhed as in other caſes of perjury; and accordingly,

1 Strange 70. Information for perjury.

In the caſe of *The King* v. *Lewis*, *Mich.* 4 *Geo.* 1. An information was moved for againſt a clergyman, for perjury at his admiſſion to a living, upon an affidavit that the preſentation was ſimoniacal. But the court refuſed to grant it, till he had been convicted of the Simony.

31 Eliz. c. 6. ſect. 5.

If a patron is guilty of this offence, he forfeits the right of preſenting for the next turn, and alſo the double value of one year's profit of the benefice. *See page* 5.

Lane 74. Calvert and Kitchen.

But if *A.* has a right of preſentation, and *B.* that of nomination, and only one of them is guilty of Simony, the right of the other ſhall not be thereby prejudiced, nor ſhall he be ſubject to any forfeiture.

31 Eliz. c. 6. ſect. 8.

The patron who gives a ſum of money for the reſigning or exchanging any benefice is to forfeit double the value of the money ſo given. *See page* 6.

31 Eliz. c. 6. ſect. 6.

If an ordinary ſhall corruptly inſtitute, *&c.* to any benefice with cure of ſouls, or other eccleſiaſtical preferment, he is to forfeit the double value of one year's profit of the ſaid benefice. *See page* 5.

31 Eliz. c. 6. ſect. 8.

So if he takes any money for the accepting the reſignation of a benefice, he is to forfeit double the value of the money ſo taken. *See page* 6.

31 Eliz. c. 6. ſect. 10.

So if he takes any reward for the conferring orders, or the granting a licence to preach, he is to forfeit forty pounds. *See page* 6.

31 Eliz. c. 6. ſect. 9.

Beſides being liable to the forfeitures, penalties and puniſhments already mentioned, there is a proviſo in the ſtatute, that perſons guilty of this offence ſhall alſo be ſubject to ſuch puniſhments, pains and penalties to which they were before ſubject by the laws eccleſiaſtical

There are no acceſſaries in Simony, but all are principals. *Cro. Eliz.* 789. *pl.* 30. *Mich.* 42 & 43 *Eliz. C. B. Baker* v. *Rogers.*

CHAP. VII.

In what caſes, and at what times, advantage may be taken of ſuch forfeitures and diſabilities.

31 Eliz. c. 6. par. 7.

WHEREVER a living becomes void by Simony, and the patron who has right to preſent and does not preſent within ſix months, the ordinary may, as in other caſes of lapſe, preſent; but he ſhall not do this till ſix months are expired after notice is given by him to the patron of the avoidance of the benefice.

This

This proviſion in the ſtatute is agreeable to the canon law, by which lapſe cannot run againſt the patron, till notice is given him by the ordinary, that the church is void. Dyer 293.

But if two claim the right of preſentation to a void benefice, and the ordinary is not named in a *quare impedit* brought to determine the right, it ſhall, if the judgment be not obtained within ſix months, lapſe to the ordinary, for he is here in no fault. 2 Roll. Abr. 365. Abbot of York and Biſhop of Norwich.

Although a living becomes void by Simony, and the patron, not being privy to it, has a right to preſent, yet he cannot, as the king may, take advantage thereof ſo as to preſent another clerk, unleſs the perſon ſimoniacally promoted has been inducted. 31 Eliz. c. 6. ſect. 6.

By the judgment in *quare impedit* the incumbent is ſo removed, that the patron who recovers may preſent, although there be no ſentence of deprivation: but the clerk againſt whom the judgment is obtained, continues incumbent *de facto* till ſuch preſentation is made. 1 Roll. Rep. 62.

One moiety of all the forfeitures mentioned in the ſtatute is given to any perſon who will ſue for the ſame. 31 Eliz. c. 6. ſect. 10.

CHAP. VIII.

Of the King's right; when *he may preſent, and the effect of his pardoning Simony.*

IF the patron contracts with *one* and preſents *another*, tho' the contract with the firſt was ſimoniacal, yet if the preſentment of the other was without Simony, the king gains nothing; ſo there muſt be an actual, tho' not an effectual preſentation; but a bare preſentation without any admiſſion intitles the king. *Hob.* 167. 14 *Jac.* 1. in the caſe of *Winchcombe* v. *Pulleſton*. Preſentation without admiſſion intitles the king. Winchcombe v. Pulleſton.

Lord *W.* the patron, granted the next avoidance to *G.* afterwards the church became void: *H.* the father of *I.* agreed with *G.* that he ſhould permit the lord *W.* to preſent the ſaid *I.* and gave him 200 l. *G.* thereupon procured the Ld. *W.* to preſent *I.* which he did, and *I.* was inſtituted and inducted, but did not know any thing of this agreement. It was reſolved by the advice of the two chief juſtices and chief baron, that he was preſented by Simony, and that by the ſtatute 31 *Eliz.* c. 6. it belonged to the king to preſent without any deprivation of the incumbent, or removing him by a *quare impedit*; whereupon In caſe of Simony, king may preſent without depriving the incumbent, or removing him by quare impedit. Booth v. Potter.

ſee post. 37.

the king presented *L.* his clerk, who was instituted and inducted, and continued incumbent for three years; afterwards *H.* sued *L.* before the high commissioners, and got him to be deprived, and procured a grant of the next avoidance from *G.* to *S.* and then procured the said *S.* to present *I.* his son, who was again admitted, instituted, and inducted. Adjudged, that the presentation of *I.* was merely void, and he is a person disabled by the express words of the statute ever to accept of that benefice. *Cro. J.* 533. *Pasch.* 17 *Jac. B. R. Booth* v. *Potter.*——2 *Roll. Rep.* 83. *Lapthorn*'s case, *alias Bath* v. *Potter*, *S. C.* in the court of wards, (the lord *W.* being then in ward to the king) and resolved accordingly. And in this report it is said, that the patron nor his presentee knew any thing of the money given; and it being insisted, that *I.* not being a *Simoniacus*, but being only *simoniace inductus*, he was capable according to the civil law to accept a new presentation to the same church; but the judges said, that before this statute such distinction would have served, but that now they ought to make a construction for the further suppression of the said mischief, and in advancing the good of the church; and directed the jury to find accordingly.

J. C. Jenk. Journ. MSS. Rep. A. a.

Statute ought to be construed for suppressing mischief, and advancing the good of the church.

At what time the king may present. Death of a Simonist hinders not the king's presentation.

One was presented by Simony in 27 *Eliz.* which incumbent enjoyed the living till 7 *Jac.* 1. when he *died incumbent.* Resolved that the *death* of the simoniacal incumbent does not hinder, but that the king may well present; for the church was never full as to the king, and that turn is preserved to the king by force of the statute; yet it seems that the church is so full that a stranger may not present for usurpation; for it is not like 7 *Rep.* where the king is to present by lapse; and there were many cases put, as that the church may be full or void in effect, when there is a simoniacal incumbent. *Noy* 25. *Winchcombe* v. *Pulleston. Mo.* 877. *Pasch.* 14 *Jac.* 1. *C. B. Winchcombe* v. Bishop of *Winchester* and *Pulleston*, *S. C.* says that the patron, not having, since the death of the simoniacal incumbent, filled the church by the presentation, institution, and induction of any other, it is still void, so as the king may present thereto; but if a *new* parson had been in possession by the presentation of the patron before the king had presented, it had been otherwise.——*Brownl.* 164, 165. *S. C.* and that *Hobart* and *Winch* held that the king had not lost his presentation, because *S.* never was parson.——*Hob.* 165. *pl.* 194. *S. C.* resolved accordingly.——

The

The ſimoniacal preſentation of an uſurper does not however give the crown a right of preſenting; for it would be unreaſonable to take away the right of the true patron who is in no fault. 3 *Inſt.* 153.

If there has been an actual preſentation on a ſimoniacal contract, the king may preſent, although the incumbent has neither been inſtituted nor inducted. *Hob.* 167. *Winchcombe* v. *Pulleſton.*

But wherever an incumbent is inſtituted and inducted, the king cannot take advantage of the ſimoniacal contract until he be removed by *quare impedit*; for although he is in *de facto* only, and not *de jure*, the church is full till he is removed in a judicial way. *Cro. Jac.* 385. King *v.* Biſhop of *Norwich* and others.

A church being void, *A.* agreed to give *B.* a ſum of money for procuring *C.* the patron for that turn to preſent *D.* The money was paid, and *D.* being preſented enjoyed the living till his death. Afterwards *E.* to whom the right of preſenting for the next turn belonged, preſented *F.* In *quare impedit* there was judgment for the king, although neither *E.* nor *F.* was privy to the ſimoniacal contract between *A.* and *B. Lutw.* 1090. *Paſch.* 3 *Jac.* 2. King and Biſhop of *Chicheſter* and others. But ſee the following act which is ſaid to have been occaſioned by this very caſe:

Simony of dead incumbent, without the knowledge of living patron or clerk, intitles the king.

Stat. 1 Wil. *and* Ma. c. 16. [A. D. 1688.] *Intituled an act that the ſimoniacal promotion of one perſon may not prejudice another.*

Whereas it hath often happened that perſons ſimoniack or ſimonically promoted to benefices or eccleſiaſtical livings, have enjoyed the benefit of ſuch livings many years, and ſometimes all their life-time, by reaſon of the ſecret carriage of ſuch ſimoniacal dealing; and after the death of ſuch ſimoniack perſon, another perſon innocent of ſuch crime, and worthy of ſuch preferment, being preſented or promoted by another patron innocent alſo of that ſimoniacal contract, have been troubled and removed upon pretence of lapſe (or otherwiſe) to the prejudice of the innocent patron in reverſion, and of his clerk, whereby the guilty go away with profit of his crime, and the innocent ſucceeding patron and his clerk are puniſhed contrary to all reaſon and good conſcience:

II. For prevention whereof, be it enacted by the King's and Queen's moſt excellent majeſties, by and with the advice and

Simoniacal contract where it ſhall not prejudice.

and conſent of the lords ſpiritual and temporal, and commons, in this preſent parliament aſſembled, and by the authority of the ſame, that after the death of the perſon ſo ſimoniacally promoted, the offence or contract of Simony ſhall neither by way of title in pleading, or in evidence to a jury, or otherwiſe, hereafter be alledged, or pleaded to the prejudice of any other patron innocent of Simony, or of his clerk by him preſented or promoted, upon pretence of lapſe to the crown, metropolitan, or otherwiſe, unleſs the perſon ſimoniack or ſimoniacally preſented, or his patron, was convicted of ſuch offence at the common law, or ſome eccleſiaſtical court, in the life-time of the perſon ſimoniack or ſimoniacally promoted or preſented; any law or ſtatute to the contrary notwithſtanding.

Leaſe made *bona fide* by Simoniſt good.

III. And be it alſo provided, enacted, and declared by the authority aforeſaid, that no leaſe or leaſes, really and *bona fide* made, or hereafter to be made, by any ſuch perſon as aforeſaid, ſimoniack or ſimoniacally promoted to any deanery, prebend, or parſonage, or other eccleſiaſtical benefice or dignity, for good and valuable conſideration, to any tenant or perſon not being privy unto, or having notice of ſuch Simony, ſhall be impeached or avoided for or by reaſon of ſuch Simony, but ſhall be good and effectual in law, the ſaid Simony notwithſtanding.

Pardon.

If the king pardons the Simony, yet the church remains ſtill void as to this preſentation. *Hob.* 167. 14 *Jac.* 1. in the caſe of *Winchcombe* v. *Pulleſton.*

The pardon does not make the church to be *plena* of the Simoniſt, but makes the offence diſpuniſhable only; but if in ſuch caſe the king preſents, his preſentee ſhall have the tithes. *Godb.* 202. *pl.* 288. *Trin.* 10 *Jac. C. B.* Dr. *Hutchinſon*'s caſe.

The whole court reſolved, that tho' the general pardon diſcharged the puniſhment for Simony, yet if the parſon comes in by Simony it is examinable by the ordinary; for he ought to provide that the church be not ſerved with corrupt perſons; and if he finds Simony he may well deprive for that cauſe; and for that reaſon the church was never full of him, and made him no parſon *ab initio*, and the pardon does not enable him to retain it. *Cro. E.* 685, 686. *pl.* 21. *Trin.* 41 *Eliz. C. B. Smith* v. *Shelbourn.*——*Mo.* 916. *S. C.* accordingly, but the Reporter ſays, *quid quære.*——*Ow.* 87, 88. *S. C.* by the name of *Eliza Smith*'s caſe. And there *Glanvil* held, that the church was not void till ſentence declaratory of the Simony, and that by pardon before the ſentence all is pardoned; but *Walmeſley* and *Anderſon* held that the pardon

don extended only to the puniſhment, ſo that if the patron be charged by the ſentence, he may plead the pardon, but ſhall not prevent the declaring the church void. And *Walmeſley* ſaid it ſhall not bar a 3d perſon that brings a *quare impedit*, becauſe the title does not belong to him, but the puniſhment only; and he doubted whether the King can pardon Simony. And *Williams* ſaid, that the civilians ſay that neither the Pope nor the King could pardon Simony *quoad culpam*, but only *quoad pœnam* they may.

A *general* pardon does not pardon Simony. *See Sid.* 170. *Mich.* 15 *Car.* 2. *C. B. Phillip*'s caſe.

It ſeems agreed, that notwithſtanding the king's pardon to a Simoniſt coming into a church contrary to the purport of 31 *Eliz. c.* 6. or to an officer coming into his office by a corrupt bargain, contrary to the purport of 5 & 6 *Ed.* 6. *c.* 16. may ſave ſuch clerk or officer from any *criminal* proſecution in reſpect of the corrupt bargain; yet ſhall it not enable the clerk to *hold* the church, nor the officer to retain his office, becauſe they are abſolutely diſabled by ſtatute. 2 *Hawk.* 396. *cap.* 37. *ſect.* 56.

CHAP. IX.

Of the pleadings in actions of quare impedit *upon the ſtat. of* 31 Eliz. C. 6.

THE poſſeſſion of a benefice to which an incumbent is ſimoniacally promoted, may be recovered by an aſſize of *darrien* preſentment, or by a writ of *quare impedit*. The laſt is uſually preferred, becauſe, beſides its being a ſhorter way of proceeding, not only the right of preſentation, but the advowſon alſo is thereby recovered.

It is not enough to alledge in the declaration, that the plaintiff, or the perſon under whom he claims, was ſeiſed of the advowſon, but a preſentation muſt be alledged by him or ſome perſon under whom he claims, for unleſs a paſt preſentation is connected with the right, it does not appear that the right of preſentation is now in the plaintiff. Vaugh. 57. King and Biſhop of Worceſter & al'.

The declaration is good, although there be no recital of the ſtatute in it; but it was formerly done, and it is as well to recite it. Lutw. 1090.

Nor is there any danger in doing this, for a miſrecital of the ſtatute in pleading is not fatal. Cro. Eliz. 738. Baker and Rogers.

At the common law the patron muſt be named in the writ, for the incumbent cannot alledge any thing which concerned the right of patronage, and it would be unreaſonable to name him alone who could not defend the right of patronage: But, as he is by the 25 *Edw.* 3. *c.* 7. enabled to plead his patron's right in defence of his incumbency, it is not now neceſſary to name the patron, unleſs the right of inheritance is to be affected by the judgment.

7 Co. 25. Hall's caſe. Cro. Jac. 650. 3 Lev. 16.

Agreeably hereto it is now ſettled, that where the inheritance of the patron can be deveſted by the judgment he muſt be named in the writ; and it is uſual to name the ordinary alſo for the ſake of preventing a lapſe *pendente lite*.

March 159. Palmer & Rudd.

It has however been held, that no incumbent can plead his patron's right, without ſhewing that he is a parſon *imparſonee* of the preſentation of his patron.

7 Co. 26. Hall's caſe.

An incumbent is not parſon *imparſonee* as againſt the King, unleſs he be admitted, inſtituted, and inducted; but admiſſion and inſtitution will make him ſo as againſt any other perſon.

At the common law the ordinary could only plead, that he claims nothing but as ordinary; but, by the ſtat. 23 *Ed.* 3. *c.* 7. he may now plead a title in himſelf by lapſe, or that the right of patronage is in him.

Simoniacal agreement not avoided by pleading Simony. This denied to be law. ſee page 14.

Bond given upon a ſimoniacal agreement ſhall not be avoided by pleading Simony; *per Coke*. Ch. J. who ſays, it was ſo adjudged in *C. B.* 2 *Bulſ.* 182. 11 *Jac.* 1. Sir *William Boyer* v. the High Commiſſioners. *Noy.* 25. *S. P.* in caſe of *Winchcombe* v. *Pulleſton*.

Obligor may aver againſt a ſimoniacal bond.

The obligor, in the caſe of Simony, is admitted to *aver* againſt the condition of a bond, or againſt the bond itſelf for neceſſity's ſake. *Carth.* 301. *Paſch.* 6 *W. & M.* in caſe of *Fodey* v. *Hains*.

Simoniacal contract muſt be averred, and ſhewn ſpecially. Birt v. Manning.

A ſimoniacal contract muſt be averred, and ſhewn *ſpecially*, and ſhall not be ſo intended, as appears from the following caſe. *W. B.* the father covenanted that *T. B.* his ſon ſhould marry the defendant's daughter *Anne*, and in conſideration of this marriage the defendant covenanted to pay 300 l. and *W. B.* covenanted to aſſure ſuch lands to his ſon and wife for a jointure: and there were other covenants for the value thereof, and quiet enjoyment; and *M.* among other covenants, covenanted *that he would procure* T. B. *to be preſented* &c. and *inducted into ſuch a benefice*. In debt upon the bond for performance of covenants the plaintiff aſſigned a breach in the laſt covenant.

nant. The defendant demurred, becauſe this covenant is againſt law, and a ſimoniacal agreement; and ſo a bond for performance thereof is not good. But all the court held, that if it had been in conſideration of the marriage of his ſon, &c. that he would have procured him to be preſented into ſuch church, that had been a ſimoniacal contract; but here this is a mere diſtinct covenant, and independent upon the former, and that without ſpecial averment, or ſhewing that it was a ſimoniacal contract, it ſhall not be ſo intended; but it *may* be a covenant upon a good conſideration; wherefore it was adjudged for the plaintiff. *Cro. Car.* 425. 426. *pl.* 16. *Mich.* 11 *Car.* 1. *R. R.*

The ſentence of a ſpiritual court in Simony need not be ſet out *in hæc verba*, but it may be pleaded briefly. Cro. Eliz. 788. Baker and Rogers.

Where the general iſſue is pleaded in *quare impedit*, it amounts to a confeſſion of the right of patronage, and only defends the wrong with which the defendant is charged; and the plaintiff has his option to pray immediately a writ to the ordinary, or he may go on to recover damages for the diſturbance. Hob. 162. Rolt & another, and the Biſhop of Litchfield.

A clerk entred into an obligation, the condition of which was, that he being preſented, inſtituted, and inducted, to a benefice then void, ſhould, upon requeſt of the patron reſign; and he afterwards made a leaſe to the patron, and then became abſent for above 80 days together, whereby the leaſe became void; and then being requeſted by the patron to reſign, which he refuſed, the patron brought an action of debt upon the bond, to which the defendant pleaded the ſtatutes of 13 *Eliz. c.* 20 & 14 *Eliz. c.* 11. And that after his induction he let the leaſe to his patron the plaintiff, and then was abſent above eighty days together, and averred that the obligation was made for the enjoying of the benefice let by the ſaid leaſe, and to the intent to compel him not to avoid the leaſe by abſence, for fear of being requeſted to reſign, and demanded judgment, &c. upon which the plaintiff demurred; and the whole court held the plea good, and the averment to be very apt, becauſe the obligation being made generally to reſign upon requeſt, might well be averred to be for this particular purpoſe, and ſo void. *Moor* 641. *Mich.* 43 & 44 *Eliz. C. B.* To an obligation made generally to reſign upon requeſt, the particular purpoſe may be pleaded. Web v. Hargrave.

This caſe fully proves, that the bonds which have been taken from parſons upon making leaſes, with condition that they ſhould duly ſerve the cure, and not be abſent from their benefice by the ſpace of eighty days, when Cro. Eliz. 88, 490.

when they appear, or can be averred to be given for ſecurity of leaſes made by ſuch perſons, will be void within theſe ſtatutes, and no recovery allowed thereupon; but bonds, with condition not to reſign, or do any other act which ſhould cauſe an avoidance at common law, though they are made for ſecurity of ſuch leaſes, yet they will be good and binding, unleſs the parſon can ſhew an avoidance by abſence for above eighty days, and alſo aver that the bond was given to prevent ſuch avoidance; for otherwiſe, if the leaſe becomes void by reſignation, or other voluntary act of the parſon, (except ſuch abſence for above eighty days) the bond is preſently forfeited at common law; and the ſtatutes will no more relieve upon account of any abſence after, than they would againſt a covenant for that purpoſe; but if ſuch bonds were given, with a condition in the diſjunctive, not to be abſent above eighty days, nor to reſign or do any other act, which ſhould cauſe an avoidance of the leaſe at common law, *quære*, whether the whole bond be abſolutely void, or if it ſhall be good or bad, according as the avoidance firſt happens to be either upon theſe ſtatutes or at common law.

CHAP. X.

What power the Eccleſiaſtical Court has in Simony.

Cod. 839, 840.

AS Simony was a crime at common law, *(See page 4.)* there can be little room to doubt of its having been puniſhable in the temporal courts. It may be true in fact, that it was for the moſt part or altogether proceeded againſt in the eccleſiaſtical courts. As the intereſt of religion is by this offence ſtruck at in a more remarkable manner, this is not greatly to be wondered at; and the leſs, if it be conſidered that, in times antecedent to the ſtatute, ſpiritual courts did, in ſome caſes, where there was a concurrent juriſdiction, encroach upon, and in others entirely ſwallow up the power of the temporal. If then it cannot at this diſtance of time be made appear, that the latter did exerciſe juriſdiction in this caſe, it by no means neceſſarily follows, that they had none.

31 Eliz. c. 6. ſect. 9.

By the ſtatute a power is reſerved to the ſpiritual courts of inflicting ſuch puniſhments, pains, and penalties, in all the caſes therein mentioned, as by the laws eccleſiaſtical could before the making thereof be inflicted.

Agree-

Agreeably hereto it has been determined, that the ſentence of the ſpiritual court in Simony, it being a matter properly triable there, is to be taken to be true, although it does in its conſequence deveſt the incumbent of his freehold. Cro. Eliz. 788. Baker and Rogers.

So if a man is acquitted of the charge of Simony in a temporal court, the ſpiritual may re-examine the matter. Comb. 73. Boyle & Boyle.

Upon a motion for a prohibition to a ſuit in a ſpiritual court for tithes, upon the ground, that the incumbent being a Simoniack had no right thereto; it was holden that a prohibition does not lie; and by the court: Simony may be more aptly tried in the ſpiritual court. *Cro. Eliz.* 642. *Mich.* 40 *Eliz. Riſby* v. *Wentworth.* Simony properly triable in the ſpiritual court.

If *A.* be preſented by *T. S.* to a beneſice, [and is] admitted, inſtituted, and inducted, and after the king preſents his clerk to the ſame church, ſuppoſing *A.* to be preſented by Simony, and his clerk is inſtituted and inducted. Upon which *A.* ſues in the eccleſiaſtical court againſt the clerk of the king, ſuppoſing that he did not come in by Simony, and ſo prays, That the ſuper-admiſſion, inſtitution, and induction of him be repealed, a prohibition ſhall be granted for the clerk of the king upon his ſuggeſtion, that *A.* was preſented by Simony. For now the only queſtion between them is, whether the church was void or not at the time of the preſentment of the king, which is triable only by the temporal court. *Tr.* 16 *Jac. B. R.* between *Sariſon* and *Boothe.* Reſolved *per curiam*, and a prohibition granted, but after the prohibition was ſtayed. But *Hil.* 16 *Jac. B. R.* the prohibition was granted, tho' it was ſaid, that they only queſtioned the inſtitution in the eccleſiaſtical court, for this is not to be allowed after induction. *Roll. Abr.* tit. *Prohibition.* (M.) Whether a church is void, or not, at the time of a preſentation, is triable by the temporal court.

The patron of a beneſice may be ſued in the eccleſiaſtical court for preſenting of his clerk (who is now inducted) for Simony; for the ſtatute of Simony doth not take away the eccleſiaſtical juriſdiction to puniſh the party *pro ſalute animæ. H.* 11 *Jac. B. R.* Sir *William Boyer*'s caſe. Reſolved, *Roll. Abr.* tit. *Prohibition* (M.) 2 *Bulſt.* 182. *S. C. Hill.* 11 *Jac.* And there *Coke* Ch. J. ſaid, That we are not to take notice of any Simony, this being puniſhable in the ſpiritual court, and if they meddle only *pro ſalute animæ*, they are not to be prohibited; nor is a prohibition to be granted in this caſe, by reaſon that they examined *upon oath touching the Simony*; and this is clear, becauſe it was ſo done voluntarily; and notwithſtanding the in-

incumbent be dead, yet the crime remains and is living, and the examination here by them was only *pro ſalute animæ. But if there be any article to be examined upon, which any ways draws the right* and title *of the benefice into queſtion*, then clearly a prohibition is to be granted, but not otherwiſe; And ſo no prohibition was granted. —— *S. P. Bulſt.* 179. 9 *Jac.* in *Holt's* caſe —— *S P.* 2 *Le.* 168. *pl.* 205. *Paſch.* 26 *Eliz. C. B.* in *Gerard's* caſe. —— 3 *Le.* 98. *pl.* 140. *S. C.*

CHAP. XI.

Of the power of the Ordinary to accept or refuſe the reſignation of a beneſice.

Under this head is conſidered,

I. What ſhall be a good cauſe of refuſal, in reſpect of the perſon preſenting.
II. What ſhall be a good cauſe of refuſal, in reſpect of the perſon preſented, being vicious.
III. What ſhall be a good cauſe of refuſal, in reſpect of the perſon preſented, being illiterate.
IV. Where, and how the cauſe of refuſal ſhall be tried.

I. What ſhall be a good cauſe of refuſal in reſpect of the perſon preſenting,

IT is a good cauſe of refuſal of the clerk, that the perſon preſenting, being patron, is excommunicated. 15 *Hen* 7. 7. *b.* ſaid to be held in our books. 5 *Co.* 58. *Specot's* caſe.

If there be three jointenants of an advowſon, or of the next avoidance, and one or two of them only preſent, the biſhop is not a diſturber if he refuſes him, for he is not bound to admit the clerk if all the jointenants do not join in the preſentment. *Dy.* 14 *Eliz.* 304. *pl.* 54.

But if there be three grantees of a next avoidance, and afterwards the church becomes vacant, and two of them preſent the third being a clerk, the ordinary is bound to admit him, becauſe he cannot join in the preſentment of himſelf; and he may relinquiſh his title, and accept a preſentment from the other two. *Dy.* 14 *Eliz.* 304. *pl.* 54.

If there be four coparceners of an advowſon, and the eldeſt, and the ſecond preſent, and the other two preſent another,

another, the ordinary may refuſe them all, for the eldeſt did not preſent alone, but ſhe and one other of her ſiſters.

See the caſe of *Durſton* and *Sands* in page 18; the caſe of *Hawkins* and *Turner* in *page* 19; and *Heſketh* and *Grey* in *page* 22.

II. What ſhall be good cauſe of refuſal in reſpect of the perſon preſented, being vicious.

In *quare impedit*, the biſhop returned, that at the time of the preſentation of the clerk, and at all times during his commorancy within his dioceſe, he commonly haunted taverns and other places, and played at unlawful and prohibited games, *ob quod & diverſa conſimilia crimina*, the ſaid perſon preſented, was *criminoſus*, and by all the juſtices, the particular defects above do not make the perſon preſented *criminoſus*; for that none of them deſerved a refuſal, becauſe they were but *mala prohibita*. 5 *Co.* 58 *Specot's* caſe; this caſe cited to be adjudged and that the words *ob diverſa crimina*, are too general and uncertain. 8, 9 *Eliz. Dy.* 254. *pl.* 2. in a *quare impedit*. Reſolved, that all ſuch which are ſufficient cauſes to deprive an incumbent, are ſufficient to refuſe the perſon preſented. 5 *Co.* 58. *Specot's* caſe.

That clerk haunted taverns and played at unlawful game, not good cauſe of refuſal.

It is not any cauſe of refuſal of the perſon preſented, that he hath another benefice, becauſe it is at the peril of the perſon preſented, and perhaps, the ſecond benefice is better than the firſt, and the firſt only ſhall be void; and therefore it would be miſchievous to the preſented perſon, if, therefore, he ſhould be refuſed. 14 *Hen.* 7. 28. *b. Curia.*

It is a good cauſe of refuſal, for that the perſon preſented was perjured, although there was no conviction of it. *Dy.* 13 *Eliz. fol.* 293. *pl.* 3. 38 *Ed.* 3. 2. *b.*

Perjury good cauſe of refuſal.

So ſhall it be, though he was perjured in a ſuit between the ordinary and another. *Dubitatur.* 38 *Ed.* 3. 2. *b.*

It is a good cauſe of refuſal that the perſon preſented hath killed a man. 38 *Ed.* 3. 2. *b.*

Killing a man is good cauſe of refuſal.

The ordinary may refuſe a clerk upon his own knowledge of an offence committed by the perſon preſented, that is a good cauſe of refuſal, although he be not convicted of it by their law; and it ſhall be tried by an iſſue, whether it were true or not. 38 *Ed.* 3. 2. *b.*

Ordinary's own knowledge of an offence, good cauſe.

It is a good cauſe of refuſal of a clerk, for that he is *Simoniacus* in the ſame preſentment, *i. e.* hath made a corrupt contract to be preſented. So it is a good cauſe of refuſal of a clerk, that he is *Simoniacus* in another benefice than that to which he is now preſented. *Trin.* 16. *Jac.*

Simony is a good cauſe of refuſal.

Jac. C. B. between *Boughton* and the biſhop of *Rocheſter* in a *quare impedit, per Curiam.*

Schiſm, irreligion, hereſy, good cauſes.

If a *miſcreant* or *ſchiſmatic* be preſented and inducted, this is good cauſe of deprivation. 5 *Rep.* 58 in *Specot*'s caſe, cites 5 *R.* 2. *tit. Trial.* 54. and ſays it was agreed to be good law; ſo if he be *irreligious*, he may be refuſed, as it is ſaid in 5 *H.* 7. 6. but when he is charged with the one, or refuſed for the other, it muſt be alledged *particularly*; ſo that the party may anſwer thereto. *ibid.* And ſo hereſy is a good cauſe of refuſal. *Jenk.* 259. *pl.* 55. And though it does not belong to the king's courts to determine ſchiſms or hereſies, yet the original cauſe of the ſuit being matter whereof the king's court has conuſance, the cauſe of ſchiſm or hereſy upon which the preſentee is refuſed ought to be alledged in certain, that the king's court may conſult with divines to know if it be ſchiſm or not; and in caſe the party be dead, then to direct a jury to try it. 5 *Rep.* 58. *a. b.* Reſolved in *Specot*'s caſe.

It is in the power of the ordinary to accept or refuſe a reſignation. Mar. of Rockingham v. Griſſith.

The biſhop's acceptance of a reſignation is neceſſary to make it valid: Thus in the caſe of the marchioneſs of *Rockingham* and *Griffith*, Mar. 22, 1755. Dr. *Griffith* being poſſeſſed of the two rectories of *Leythley* and *Thurnſco*, in order that he might be capacitated to accept another living which became vacant, to wit, the rectory of *Handſworth*, executed an inſtrument of reſignation of the rectory of *Leythley* aforeſaid, before a notary publick, which was tendred to and left with the archbiſhop of *York*, the ordinary of the place within which *Leythley* is ſituate. It was objected, that there doth not appear to have been any acceptance of the reſignation by the archbiſhop, and that without his acceptance the ſaid rectory of *Leythley* could not become void. And it was held by the lord chancellor clearly, that the ordinary's acceptance of the reſignation is abſolutely neceſſary to make an avoidance: But whether in this caſe there was a proper reſignation and acceptance thereof, he reſerved for further conſideration, and in the mean time recommended it to the archbiſhop to produce the reſignation in court.—Afterwards, on the 17th of *April* 1755, the cauſe came on again to be heard, and the reſignation was then produced; but the counſel for the executors of the late marquis declaring that they did not intend to make any further oppoſition, the lord chancellor gave no opinion upon the reſignation, or the effect of it; but in the courſe of the former argument, he held, that the acceptance of a reſignation by the ordinary is neceſſary to make it effectual, and that it

is in the power of the ordinary to accept or refuſe a reſignation. 3 *Burn.* Eccl. Law, *tit.* Reſignation.

A grant was made to a clerk of the two firſt of three benefices, which ſhould become void, provided he were capable when they became void of holding them. In order to make himſelf capable of taking one of theſe benefices, the clerk offered a reſignation of another benefice to the ordinary, which he refuſed to accept. One queſtion in this caſe was, whether the ordinary was obliged to accept the reſignation? It was inſiſted by Mr. *Henley*, upon one ſide, that no caſe can be adduced to ſhew, that the ordinary can arbitrarily refuſe to accept a reſignation of a benefice. Mr. attorney *Murray*, who was on the other ſide, contented himſelf with ſaying, in anſwer to this, that the plaineſt points, having ſcarce ever been called in queſtion, are ſupported by the feweſt authorities. No decree was made as to this point; but as lord *Hardwicke* intimated it once or twice pretty ſtrongly to be his opinion, that the ordinary ought to have accepted the reſignation, he did afterwards accept it. 4 *Bac. Abr.* 472. cites *M. S. Rep.*

Another report of the preceding caſe.

III. What ſhall be good cauſe of refuſal in reſpect of the perſon preſented being illiterate.

In *Vaughan* 208, it is ſaid, it is no exception to diſable a man of having any church dignity whatſoever, that he is not knowing in the *Hebrew* or *Greek* tongue. But it is a good cauſe of refuſal if the perſon preſented doth not underſtand the language of the country where he is to preach. 1 *Cro.* 119. *Albany* againſt the biſhop of St. *Aſaph*, adjudged. *Mich.* 30, 31 *Eliz. B. R. Intratur Trin.* 27 *Eliz.* 1 *Leon.* 31.

In *quare impedit*, the biſhop pleads, that he demanded of *I. S.* the preſentee of the plaintiff, to ſee his letters of orders, and he would not ſhew them; and for this cauſe, for that he was not aſcertained, whether he were deacon or not; and alſo he demanded of him letters miſſive, or teſtimonials teſtifying his ability; and becauſe he had not his letters of orders, nor letters miſſive, nor made proof of them otherwiſe to the biſhop, he deſired leave of the biſhop to bring them, and he gave him a week, and went away and came not again, and that the ſix months paſſed, and he collated by lapſe; and upon demurrer upon it it was adjudged for the plaintiff; for theſe were not cauſes to ſtay the admittance, and the clerk is not bound to ſhew his letters of orders or miſſive to the biſhop, but the biſhop muſt try him upon examination for the one and the other; and the plea is not alledged in *facto*, but *pro eo quod non*

Refuſing to ſhew letters of orders, not good cauſe.

non-

monſtravit, ſo that all cometh under the *eo quod*, and ſo no part of it is traverſable; and for one and the other cauſe it was adjudged for the plaintiff. *Cro. Eliz.* 241, 242. *Trin.* 33 *Eliz. B. R.*

Margaret Palmes v. The biſhop of *Peterborough*, Lev. 230. S. C. and *Anderſon* ſaid, that the biſhop may examine him upon oath if he has orders or not; but as to the letters teſtimonial of his good behaviour and ſufficiency, the biſhop ought to examine the ſame himſelf, and if he gives day and defers the admiſſion, becauſe he is not reſolved therein, he is a diſturber if the clerk comes to him in a convenient time; and the biſhop cannot refuſe a clerk for the want of letters teſtimonial. See 1 *Burn. Eccl. Law.* p. 138.

Clerk refuſed becauſe not ſufficiently learned, &c. Biſhop of Exeter v. Hele.

In *quare impedit*, plaintiff counts that he was ſeiſed in fee of the advowſon, and that the church becoming void, he preſented one *G.* who died, and that it belonged to him to preſent, and the defendants diſturbed him; the biſhop claimed nothing but as ordinary; and ſaid that within ſix months after the avoidance, the plaintiff preſented *Francis Hodder*, who, at that time was a perſon *minus ſufficiens in literatura ſeu capax* to have the ſaid church; that he examined him, and finding him *minus ſufficientem*, he refuſed him; whereupon he gave notice to the plaintiff, and he not preſenting within the ſix months, the biſhop collated the defendant; plaintiff replies, that *Hodder*, at the time of his preſentation *&c.* was in holy orders, and had been admitted thereto upon examination by the ordinary, and was inſtituted a vicar into another church for divers years, and was *in verbo divino doctus*, &c. The plea was held good by three juſtices (there being then no chief juſtice) but was adjourned to be further argued; afterwards *Treby* being made chief juſtice) it was held, *per tot. Cur.* to be an ill plea, 3 *Lev.* 313. *Trin.* 3 *W.* & *M. C. B. Hele* v. the biſhop of *Exeter* and *Hayman*.—But this judgment was reverſed in the houſe of lords.—2 *Lutw.* 1094. *S. C.* but only ſtates the pleadings, and does not report the caſe —The biſhop muſt ſhew in what particular he is *minus ſufficiens*, Salk. 519. S. C.—The court inclined that he was ſtill ſubject to an examination of his ability on a new promotion, but gave no reſolution. *Carth.* 311, 312. *S. C.* by name of the biſhop of *Exeter* v. *Hele*. *Show. Parl. C.* 88. S. C.

4. *Where*

IV. Where, and how, the cauſe of refuſal ſhall be tried.

By the ſtat. of *Articuli Cleri*, 9 *Ed.* 2. *ſt.* 1. *c.* 13. it is enacted as follows: It is deſired, that ſpiritual perſons whom our lord the king doth preſent unto benefices of the church (if the biſhop will not admit them either for lack of learning, or for other cauſe reaſonable) may not be under the examination of lay perſons in the caſes aforeſaid, as it is now attempted, contrary to the decrees canonical; but that they may ſue unto a ſpiritual judge for remedy, as right ſhall require. The anſwer; of the ability of a parſon preſented unto a benefice of the church, the examination belongeth to a ſpiritual judge, and ſo it hath been uſed heretofore, and ſhall be hereafter.

It is required by law, that the perſon preſented be *idonea perſona*, for ſo are the words of the king's writ, *præſentare idoneam perſonam*; and this *idoneitas* conſiſteth in diverſe exceptions againſt perſons preſented; 1ſt, Concerning the perſon, as baſtardy, outlawry, excommunication, a layman, under age, and the like. 2dly, Concerning his converſation, as if he be *criminoſus*, &c. 3dly, Concerning his inability to diſcharge his paſtoral duty, as if he be unlearned, and not able to feed his flock with ſpiritual food, *&c.* and the examination of the ability and ſufficiency of the perſon preſented belongs to the biſhop, who is the eccleſiaſtical judge, and in this examination he is a judge, and not a miniſter, and may, and ought to refuſe the perſon preſented, if he be not *idonea perſona*. And if the cauſe of refuſal be for default of learning, or that he is an heretick, ſchiſmatick, or the like, belonging to the knowledge of eccleſiaſtical law, there he muſt give notice thereof to the patron; but if the cauſe be temporal, as a felon or homicide, or other temporal crime, or *if the diſability grow by an act of parliament* or other temporal law, there no notice ought to be given, unleſs notice be preſcribed to be given thereby. But in a *quare impedit* brought againſt the biſhop for refuſal of the clerk, he muſt ſhew the cauſe of his refuſal ſpecially and directly (for whether the cauſe thereof be ſpiritual or temporal, the examination of the biſhop concludes not the plaintiff) to the intent the court, being judges of the principal cauſe, may conſult with learned men in that profeſſion, and reſolve whether the cauſe be juſt or no; or the party may deny the ſame, and then the court ſhall

write to the metropolitan to certify the ſame, or if the cauſe be temporal and ſufficient in law, (which the court muſt decide) the ſame may be traverſed, and an iſſue thereupon joined, and tried by the country; and yet in ſome caſes, notwithſtanding this ſtatute, *idoneitas perſonæ* ſhall be tried by the country, or elſe there ſhould be a failure of juſtice, (which the law will never ſuffer) as if the inability or inſufficiency be alledged in a man that is dead, this caſe is out of the ſtatute, for the biſhop cannot examine him; and the words of this act are *de idoneitate perſonæ preſentatæ ad beneficium eccleſiaſticum pertinet examinatio*, &c. And conſequently, tho' the matter be ſpiritual, yet ſhall it be tried by a jury; and the court, being aſſiſted by learned men in that profeſſion, may inſtruct the jury as well of the eccleſiaſtical law in that caſe as they uſually do of the common law. 2 *Inſt.* 632.

Being *ſchiſmaticus inveteratus* too general.—Cauſe of refuſal traverſable.

In *quare impedit* againſt the biſhop he pleaded, that he refuſed the clerk, becauſe upon examination he found him to be *ſchiſmaticus inveteratus*, and for that reaſon he refuſed to admit him, as being a perſon by the laws of the church unable and unfit to take a benefice with cure of ſouls. This plea was adjudged in *C. B.* to be inſufficient, becauſe it was generally *ſchiſmaticus inveteratus*: And upon error brought in *B. R.* the judgment was affirmed; for the ſtatute of *Articuli Cleri*, cap. 13. ſays, *propter defectum ſcientiæ* and other reaſonable cauſes, whereas *cauſa vaga & incerta* is not a reaſonable one; and tho' the biſhop (as it was urged) is judge in the examination, yet, ſince his proceedings are not of record, the cauſe of refuſal is traverſable; and if it be traverſed, and the party refuſed be alive, it ſhall be tried by the metropolitan, but if he be dead it ſhall be tried by the country. And if ſuch general allegations be admitted, patrons will be much prejudiced nowadays in their preſentations. 5 *Rep.* 57. *Hill.* 32 *Eliz. B. R.* Specot's *caſe*.—Alias *Specot.* v. Biſhop of *Exeter*.

If clerk dead, his non-ability muſt be tried by a jury.

Quare impedit againſt the biſhop and others; the biſhop ſaid, that he examined the clerk of the plaintiff at *B.* in the county of *C.* and refuſed him for non-ability, and gave notice to the plaintiff thereof, and he did not preſent another within ſix months, by which he preſented by lapſe; and the plaintiff ſaid, that his clerk was able, and becauſe the clerk is now dead, this cannot be tried by the metropolitan by examination, and therefore it was tried *per pais*, and this by the county of *C.* where the examination was, and not by the county of *D.* where the writ is brought;

brought; *quod nota. Br. quare impedit. pl.* 102. cites 39 *E.* 3. 1, 2.

In *quare impedit* if the biſhop juſtifies the refuſal of the clerk becauſe the church was litigious till he enquired *de jure patronatus*, he ſhall not traverſe all refuſals after the enquiry, by reaſon that he has juſtified before; and if the plaintiff alledges other refuſal after the enquiry *de jure patronatus*, this is a departure and jeofail; for he relinquiſhes his firſt day alledged of the refuſal, which ought not to be; for if he will have advantage thereof, he ought to have alledged this day at firſt; for he ſhall alledge only one day. *Br.* repleader, *pl.* 41. cites 33 *H.* 6. 13.

Good plea for the ordinary that the clerk did not return to be examined.

The ordinary commanded the clerk to come to him afterwards to be examined, becauſe the ordinary had then other buſineſs. And there the better opinion was, that it was a good plea for the ordinary, that he did not refuſe the clerk, but that the clerk did not return to him again; and that the ſix months paſſed, ſo as he made the collation, and that the patron made his preſentation too late, ſo as he had not convenient time to examine him. 3 *Le.* 46. *Mich.* 15 *Eliz.* in *C. B.* cited by lord *Dyer*, as 14 *H.* 7. 21.

CHAP. XII.

The caſes at large, in the great cauſe determined in the houſe of peers, in May 1783, *between the Right Rev.* Robert, *Biſhop of* London, *and* Lewis Diſney Ffytche, *Eſq; on a writ of error from the court of* King's Bench, *with the arguments of the judges* Heath, Buller, Nares, Willes, *and* Gould; *and of the chief baron* Skynner, *and Mr. baron* Eyre, *in ſupport of their reſpective anſwers to the* 12 *queſtions propoſed to them by the lords on the motions of lord* Thurlow *and the earl of* Mansfield; *alſo the ſpeeches of the biſhops of* Saliſbury, Bangor, Llandaff, *and* Glouceſter; *of lord* Thurlow, *the earl of* Mansfield, *and the duke of* Richmond, *with the judgment of the Houſe of Peers, as it is entred in their lordſhips journals.*

The Right Rev. *Robert*, Biſhop of *London*, plaintiff in error, againſt *Lewis Diſney Ffytche*, Eſq. defendant. Upon a writ of error in the Houſe of Lords.

The CASE of the Plaintiff in Error.

THAT the rectory of the pariſh church of *Woodham Walter* in *Eſſex*, in the dioceſe of *London*, became vacant in or about *May* 1780, by the death of *Foot Gower*, and the biſhop of *London*, plaintiff in error, having at the requeſt of the defendant in error, *Lewis Diſney Ffytche*, Eſq. the patron, waved the advantage of lapſe, it was not till the 2d of *Jan.* 1781, that Mr. *Ffytche* preſented his clerk, the Rev. *John Eyre* to the biſhop for inſtitution.

That the biſhop being informed, that the ſaid *John Eyre* had given his patron a bond, in a large penalty, to reſign the ſaid rectory at any time upon his requeſt; and the ſaid *John Eyre* acknowledging that he had given ſuch a bond; the biſhop refuſed to inſtitute him to the living.

Eaſter, 1781. Declaration in *quare impedit.*

The defendant in error thereupon brought a writ of *quare impedit*, in the court of *Common Pleas* and in *Eaſter* term 1781, delivered a declaration, in which he ſtated, that one *Thomas Ffytche*, deceaſed, was ſeiſed of the advowſon

vowſon of the ſaid church in groſs by itſelf, as of fee and right, and being ſo ſeiſed, on the 24th April 1769, preſented to the ſaid church, then being vacant, *Foote Gower*, clerk, who on that preſentation was admitted, inſtituted, and inducted into the ſame; and that the ſaid *Thomas Ffytche*, on the 10th *February*, 1777, died, ſeiſed of his ſaid eſtate in the ſaid advowſon, upon whoſe death it deſcended to *Elizabeth Ffytche*, then and ſtill the wife of the defendant in error, and daughter and only child of *William Ffytche*, deceaſed, the brother of the ſaid *Thomas Ffytche*, as neice and heir at law of the ſaid *Thomas Ffytche*, whereby the defendant in error and *Elizabeth* his wife, in her right, became ſeiſed of the advowſon of the ſaid church in groſs; and being ſo ſeiſed on the 26th *May* 1780, the ſaid church became vacant by the death of the ſaid *Foote Gower*, and is yet vacant, by reaſon whereof it belonged, and now belongs, to the defendant in error, in right of the ſaid *Elizabeth* his wife, now living, to preſent a fit perſon to the ſaid church; yet the plaintiff in error, the biſhop of *London*, hinders him from preſenting a fit perſon to the ſaid church, to his damage of 200 l.

The biſhop pleads two pleas: 1ſt, that the living is a benefice with cure of ſouls.

To this declaration the biſhop pleaded two pleas; in the firſt of which he ſays, that the defendant in error ought not to have had or maintained his aforeſaid action againſt him, becauſe the ſaid church of *Woodham Walter* is within his dioceſe of *London*, and a benefice with cure of ſouls: And that the ſaid church having ſo become vacant, by the death of the ſaid *Foote Gower*, as in the ſaid declaration is mentioned, afterwards and whilſt the ſame was and continued vacant, and before the making of the preſentation after mentioned, (to wit) on the 2d day of *January*, 1781, at *Woodham Walter* aforeſaid, it was corruptly, ſimoniacally and unlawfully, and againſt the form of the ſtatute in that caſe made and provided, agreed, by and between the defendant in error and one *John Eyre*, that he the defendant in error ſhould preſent the ſaid *John Eyre* his clerk to the ſaid church, ſo being vacant, and that the ſaid *John Eyre* ſhould in conſideration thereof ſeal, and as his act and deed deliver unto the defendant in error a certain writing obligatory, whereby he the ſaid *John Eyre* ſhould become bound to the ſaid defendant in the penal ſum of 3000 l, with a condition thereunder written, that in caſe the ſaid *John Eyre* ſhould be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church, upon the preſentation of the

The agreement for a bond from the clerk in conſideration of the preſentation.

In the penalty of 3000 l.

defendant in error, then if he the ſaid *John Eyre* ſhould and did at any time then after, upon the requeſt of the ſaid defendant his heirs or aſſigns, abſolutely reſign the ſaid rectory or pariſh church of *Woodham Walter* into the hands of the biſhop of *London* for the time being, and ſhould and did give notice of ſuch reſignation to the ſaid deſendant, his heirs or aſſigns, and alſo ſhould and did procure ſuch reſignation to be accepted, ſo that the ſaid rectory and pariſh church might thereby become vacant, and the ſaid defendant in error, his heirs or aſſigns, be at liberty to preſent anew thereto, then that the ſaid writing obligatory ſhould be void; but if default ſhould happen to be made in the performance of all or any of the matters aforeſaid, ſhould be and remain in full force and virtue; and that the ſaid agreement being ſo made, the ſaid defendant in error did afterwards, on the ſame day and year laſt aforeſaid at *Woodham Walter* aforeſaid in purſuance thereof, corruptly, ſimoniacally and unlawfully, and againſt the form of the ſtatute, *&c.* preſent the ſaid *John Eyre*, his clerk, to the ſaid biſhop to be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church of *Woodham Walter*; and the ſaid *John Eyre* did alſo, in purſuance of that agreement, afterwards on the ſame day and year laſt aforeſaid at *Woodham Walter* aforeſaid, corruptly, ſimoniacally and unlawfully, and againſt the form of the ſtatute, *&c.* ſeal, and as his act and deed, deliver to the defendant in error a certain writing obligatory of him the ſaid *John Eyre*, whereby he the ſaid *John Eyre* did become bound to the ſaid defendant in the ſaid penal ſum of 3000 l, and with ſuch condition thereunder written, for making void the ſame as above mentioned, to have been in that behalf agreed upon by and between the ſaid *John Eyre* and the ſaid defendant, and which ſaid writing obligatory, with ſuch condition thereunder written as aforeſaid, the defendant in error then and there corruptly, ſimoniacally, unlawfully and againſt the form of the ſtatute, *&c.* accepted of and from the ſaid *John Eyre*; by means of which ſaid premiſes and by force of the ſtatute, the ſaid preſentation of the ſaid *John Eyre*, by the ſaid defendant ſo made as aforeſaid, became and was and is altogether void in law; and the ſaid plaintiff in error by reaſon thereof did not, nor could admit, inſtitute, or induct, nor by law ought to have admitted, inſtituted or inducted, nor yet by law ought to admit, inſtitute, or induct the ſaid *John Eyre* into the ſaid church upon or by

To reſign at any time upon requeſt of the patron.

That the patron accordingly preſented Eyre to the biſhop for inſtitution.

That Eyre, in purſuance of the agreement, became bound to the patron in a bond to the purport aforeſaid,

whereby the preſentation became void in law; and the biſhop did not, nor could nor ought to admit Eyre to the living.

virtue of that preſentation: And in the ſecond plea, ſays, Second plea.
that the defendant in error ought not to have or maintain his aforeſaid action againſt him, becauſe that the ſaid church of *Woodham Walter* is within his dioceſe of *London*, and that he hath not nor claims to have any thing in the ſame church, or in the advowſon thereof, but the admiſſion, inſtitution, and induction of perſons to that church, and what elſe to him does of right belong and appertain as being the ordinary of that church, and that the ſaid church is a benefice with cure of ſouls, and that the ſame having ſo become vacant by the death of the ſaid *Foote Gower*, as in the declaration is mentioned, afterwards, and whilſt the ſame was and continued ſo vacant, (to wit) on the ſaid 2d day of *January*, 1781, it was for the purpoſe of inveſting the defendant in error with an undue influence, power and controul over the ſaid *John Eyre* as rector of the ſaid rectory and pariſh church of *Woodham Walter*, in caſe the ſaid *John Eyre* ſhould, upon ſuch preſentation to be made by him the ſaid defendant as after mentioned, be admitted, inſtituted, and inducted into the ſame, agreed by and between the defendant in error, and the ſaid *John Eyre*; that he the ſaid defendant ſhould preſent the ſaid *John Eyre*, his clerk, to that church, being ſo vacant as aforeſaid, and that the ſaid *John Eyre* ſhould, in conſideration of ſuch preſentation, ſeal, and as his act and deed, deliver to the ſaid defendant in error, a certain writing obligatory, whereby the ſaid *John Eyre* ſhould become bound to the ſaid defendant in the penal ſum of 3000l. with a condition there underwritten (here follows a recital of the ſame condition as has been ſet forth in the former plea). And that the ſaid agreement being ſo made as aforeſaid, the defendant in error did afterwards on the ſame day and year laſt aforeſaid, at *Woodham Walter* aforeſaid, in purſuance of that agreement, preſent the ſaid *John Eyre*, his clerk, to the ſaid biſhop to be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church of *Woodham Walter*, and that the ſaid *John Eyre* did alſo, in purſuance of that agreement, afterwards on the ſame day and year laſt aforeſaid, at *Woodham Walter* aforeſaid, ſeal, and as his act and deed deliver to the defendant in error, a certain writing obligatory of him the ſaid *John Eyre*, whereby he became bound to the ſaid defendant in the ſaid penal ſum of 3000l. and with ſuch very condition thereunder written, for making void the ſame as above mentioned to have been in that behalf particularly agreed upon, by and between the ſaid *John Eyre* and the

That the living is a benefice with cure of ſouls.

And that for the purpoſe of inveſting the patron with an undue influence over the clerk, it was agreed, that the clerk ſhould, in conſideration of the preſentation, give a bond in the penalty of 3000l. to reſign at any time upon the requeſt of the patron.

And gave the bond.

ſaid defendant, and which ſaid writing obligatory, with ſuch condition thereunder written as aforeſaid, the defendant in error then and there accepted of and from the ſaid *John Eyre*: And that upon ſuch preſentation of the ſaid *John Eyre* to him the plaintiff in error, for the purpoſe aforeſaid made, the ſaid plaintiff did then and there, as ordinary of the ſaid church, duly inquire concerning the fitneſs of the ſaid *John Eyre* to be by him admitted, inſtituted, and inducted into the ſaid rectory and pariſh church; and that upon ſuch inquiry in that behalf made, the plaintiff in error did fully diſcover and find out, that the ſaid *John Eyre* had ſealed, and as his act and deed delivered to the defendant in error, ſuch writing obligatory as aforeſaid, made in ſuch penal ſum, and with ſuch condition thereunder written, for making void the ſame as above mentioned, and that by means thereof, the defendant in error would have acquired and had an undue influence, power, and controul over the ſaid *John Eyre*, as rector of the rectory and pariſh church of *Woodham Walter* aforeſaid, if the plaintiff in error had upon ſuch preſentation admitted, inſtituted, and inducted the ſaid *John Eyre* into the rectory and pariſh church of *Woodham Walter* aforeſaid, and by reaſon of the premiſes, the ſaid *John Eyre* then and there became, and was, an unfit perſon to be by the plaintiff in error admitted, inſtituted, and inducted into the ſaid rectory and pariſh church of *Woodham Walter* upon or by virtue of that preſentation, wherefore the ſaid biſhop did then and there as ordinary of that church, and as he lawfully might, and of right ought, wholly refuſe to admit, inſtitute, or induct the ſaid *John Eyre* into the ſaid church ſo being vacant as aforeſaid.

By means whereof the patron would have acquired an undue influence over the clerk, had the biſhop inſtituted upon that preſentation, and the clerk thereby became an unfit perſon to be inſtituted, wherefore the biſhop refuſed him.

Demurrer to both pleas.

To the firſt plea, the defendant in error demurred generally, and alſo demurred to the ſecond plea, and aſſigned for cauſes of demurrer to that plea, that there is no ſpecification of the undue influence, or power, or controul mentioned in the ſaid ſecond plea, with which the defendant in error was purpoſed to be inveſted over the ſaid *John Eyre*, as rector of the ſaid rectory, to which the ſaid defendant in error could give any anſwer, or upon which a proper iſſue could be joined to be tried by a jury: And alſo that it is not in that plea alledged, how and in what manner the ſaid ſaid *John Eyre* was or did become a perſon unfit to be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church,

church, ſo that any iſſue could be taken upon ſuch allegation of his unfitneſs.

The biſhop joined in demurrer.

Joinder in demurrer

In *Hilary* term 1782, the court of common pleas gave judgment for the defendant in error upon both pleas.

Hilary term, 1782, judgment for Mr. Ffytche.

Upon this judgment the biſhop brought a writ of error in the court of *King's Bench*, and aſſigned the common errors, and upon argument in *Michaelmas* term 1782, the judgment of the court of *Common Pleas* was affirmed.

Writ of error in the king's bench, judgment affirmed.

Plaintiff in error has brought his writ of error before your Lordſhips, and humbly hopes the ſaid judgment will be reverſed, for the following (amongſt other)

REASONS:

1. BECAUSE although there are ſeveral adjudged caſes upon the ſubject of general bonds of reſignation, none of them have ariſen in the ſame form, or between parties acting in the ſame capacity, and under circumſtances ſimilar to the preſent; and therefore they ought not to beconſidered as precedents by which this caſe is to be determined.
2. BECAUSE the biſhop or ordinary is authoriſed by law to judge in the firſt inſtance, of the fitneſs or unfitneſs of the perſon preſented to him for inſtitution; and the biſhop of *London* has in this inſtance exerciſed his authority according to law.
3. BECAUSE it is in the power of the patron, by means of a general bond to eſtabliſh two modes of ſelling a vacant living, which is Simony, either of which are equally certain and infallible: 1ſt, The parties may make the penalty in the bond adequate to the price of the living; the preſentee, when inſtituted, may refuſe to reſign and pay the penalty without ſuit; or may make known the execution of the bond, and then tender reſignation to the biſhop, which the biſhop under thoſe circumſtances will probably refuſe; upon his refuſal the bond may be put in ſuit; and thus alſo, by a circuity, the penalty may be paid, as the price of the living.

The ſecond mode of ſelling a living which is vacant, through the medium of a general bond of reſignation, is equally obvious and practicable; the penalty of the bond of reſignation may be made exceſſive, much above the real value of the living; the patron may, during the incumbency of

the

the preſentee, who executes the bond to reſign, ſell the next turn, or right of preſentation, and at an advanced price, and after ſuch ſale, require the incumbent to reſign in terms of his bond. By this means the firſt preſentation is fictitious, and the ſale of the ſecond preſentation, though made under the pretence of ſelling a right of preſentation to a full benefice, is in reality the ſale of a vacant living.

4. BECAUSE a general bond to reſign puts the perſon, who enters into ſuch bond, under the power of the lay patron, inſtead of being under the authority of the biſhop, to whom he ſwears canonical obedience, and whom by law he is obliged to obey, and is thus contrary to good policy, by creating an influence which tends to ſubvert eccleſiaſtical diſcipline and ſubordination.

5. BECAUSE general bonds of reſignation are contrary to law, by altering the tenure of the office of a beneficed clergyman; for every benefice being an office for life, the patron can grant it for life only: He cannot grant it for years; he cannot grant it at the will of himſelf, for ſuch a grant in direct terms would be void, as contrary to the very tenure of the office; where there is a general bond of reſignation entred into, the ſame alteration of the tenure is effected by circuity too here: The patron grants and the preſentee accepts, at the will of the patron, that benefice, which the law intends to be conferred and holden for life.

6. BECAUSE although a court of equity will grant relief in caſe the patron makes an improper uſe of a general bond to reſign, yet, from the extreme difficulty of diſcovering the real purpoſe for which they are uſed, it can ſeldom be poſſible to procure ſuch relief, or to guard by that means againſt the bad conſequences that follow from ſuch bonds being tolerated. The bad purpoſe not being diſcovered, cannot be prevented but by a ſolemn deciſion, that general bonds of reſignation are illegal.

7. BECAUSE a general bond of reſignation puts it in a great meaſure in the patron's power to convert a part of the profits of the living to his own uſe; and abſolutely puts it in the power of patron and incumbent together to make ſuch partition of them as they can agree upon, whereby the revenues of the church may be alienated.

8. BE-

8. BECAUSE a general bond of reſignation is an aſſurance of profit or benefit to the patron, and therefore contrary to the ſtatute 31 *Eliz.* cap. 6. and inconſiſtent with the oath of Simony.

J. Mansfield.
Edward Law.
William Adam.

In ERROR.

HOUSE OF LORDS.

BETWEEN

The Right Rev. ROBERT Biſhop of LONDON, } Plaintiff in Error.

AND

LEWIS DISNEY FFYTCHE, Eſquire. } Defendant in Error.

On a Writ of Error from a Judgment of his Majeſty's Court of *King's Bench*.

The CASE of the Defendant in Error.

LEWIS DISNEY FFYTCHE, Eſq. the now defendant in error, brought a writ of *quare impedit* in his majeſty's court of *Common Pleas* againſt the right reverend *Robert* biſhop of *London*, the now plaintiff in error; and thereupon the pleadings were as follows:—

Hilary term, 1781. Writ ſued out.

Eſſex to wit.—The right reverend *Robert* biſhop of *London* was ſummoned to anſwer *Lewis Diſney Ffytche*, Eſq. in a plea, that he permit the ſaid *Lewis Diſney* to preſent a fit perſon to the church of *Woodham Walter*, in the ſaid county of *Eſſex*, which is now vacant and in his gift; and thereupon the ſaid *Lewis Diſney*, by *Samuel Ennew* his attorney, ſays, That one *Thomas Ffytche*, now deceaſed, in his life time was ſeiſed of and in the advowſon of the ſaid church of *Woodham Walter*, in the ſaid county of *Eſſex*, in groſs by itſelf, as of fee and right; and

Declaration filed Eaſter term, 1781

Thomas Ffytch ſeiſed of the advowſon in groſs.

and being ſo ſeiſed thereof, he the ſaid *Thomas*, on the 24th day of *April*, in the year of our Lord 1769, preſented to the ſaid church, then being vacant, one *Foote Gower* his clerk, who, on the preſentation of the ſaid *Thomas*, was admitted, inſtituted, and inducted into the ſame in time of peace, in the time of our ſovereign lord the now king, and the ſaid *Thomas* being ſo ſeiſed of the ſaid advowſon, and the ſaid church being full of the ſaid *Foote Gower*, he the ſaid *Thomas* afterwards, (to wit) on the 10th day of *February*, 1777, at the pariſh and county aforeſaid, died ſeiſed of his ſaid eſtate therein; upon whoſe death, the advowſon of the church aforeſaid deſcended to one *Elizabeth Ffytche*, then and ſtill the wife of the ſaid *Lewis Diſney Ffytche*, and daughter and only child of *William Ffytche* then deceaſed, the brother of the ſaid *Thomas Ffytche*, as niece and heir at law of the ſaid *Thomas Ffytche*; whereby the ſaid *Lewis Diſney Ffytche* and *Elizabeth* his wife, in right of the ſaid *Elizabeth*, became ſeiſed of the advowſon of the ſaid church, as in groſs by itſelf as of fee and right: And the ſaid *Lewis Diſney Ffytche* and *Elizabeth* being ſo ſeiſed, afterwards, (to wit) on the 26th day of *May*, 1780, at the pariſh aforeſaid and county aforeſaid, the ſaid church became vacant by the death of the ſaid *Foote Gower*, and is yet vacant; by reaſon whereof it belonged, and now belongeth to the ſaid *Lewis Diſney Ffytche*, in right of the ſaid *Elizabeth*, who is now alive, to preſent a fit perſon to the ſaid church, ſo being vacant; yet the ſaid biſhop unjuſtly hinders him from preſenting a fit perſon to the ſaid church; whereupon the ſaid *Lewis Diſney Ffytche* ſays, that he is injured and hath ſuſtained damage to the value of 200l. and therefore he brings ſuit, *&c.*

Preſented Foote Gower, who was admitted.

Thomas Ffytche died.

Deſcent to Elizabeth Ffytche, wife of defendant in error.

Whereby defendant in error and his wife in her right became ſeiled.

Foote Gower died.

So belonged to defendant in error to preſent; but the plaintiff in error hinders him.

Pleas.

To this declaration the now plaintiff in error pleaded as follows: ——

And the ſaid biſhop, by *Richard Burn*, his attorney, comes and defends the wrong and injury when, *&c.* and ſays, that the ſaid *Lewis Diſney* ought not to have or maintain his aforeſaid action thereof againſt him, becauſe he ſays, that the ſaid church of *Woodham Walter*, in the ſaid county of *Eſſex*, is within his dioceſe of *London*, and a benefice with cure of ſouls; and that the ſaid church having become vacant by the death of the ſaid *Foote Gower*, as in the ſaid declaration is mentioned, afterwards, and whilſt the ſame was and continued vacant as aforeſaid, and before the making of the preſentation hereinafter mentioned, (to wit) on the ſecond day of *January*, in the

That the church being vacant,

the year of our Lord 1781, at *Woodham Walter* aforeſaid, in the county aforeſaid, it was corruptly, ſimoniacally, and unlawfully, and againſt the form of the ſtatute in that caſe made and provided, agreed by and between the ſaid *Lewis Diſney* and one *John Eyre*, that he the ſaid *Lewis Diſney* ſhould preſent the ſaid *John Eyre*, his clerk, to the ſaid church, ſo being vacant as aforeſaid, and that the ſaid *John Eyre* ſhould, in conſideration thereof, ſeal, and as his act and deed deliver, unto the ſaid *Lewis Diſney*, a certain writing obligatory, whereby the ſaid *John Eyre* ſhould become bound to the ſaid *Lewis Diſney* in the penal ſum of 3000l. of lawful money of *Great Britain*, with a condition thereunder written, that in caſe the ſaid *John Eyre* ſhould be admitted, inſtituted, and inducted into the rectory and pariſh church of *Woodham Walter* aforeſaid, upon the preſentation of the ſaid *Lewis Diſney*, then if he the ſaid *John Eyre* ſhould and did at any time thereafter, upon the requeſt of the ſaid *Lewis Diſney*, his heirs or aſſigns, abſolutely reſign the ſaid rectory or pariſh church of *Woodham Walter*, aforeſaid, into the hands of the biſhop of *London* for the time being, and ſhould and did give notice of ſuch reſignation to the ſaid *Lewis Diſney*, his heirs or aſſigns, and alſo ſhould and did procure ſuch reſignation to be accepted, ſo that the ſaid rectory and pariſh church might thereby become vacant, and the ſaid *Lewis Diſney*, his heirs or aſſigns, be at liberty to preſent anew thereto; then that the ſaid writing obligatory ſhould be void; but if default ſhould happen to be made in the performance of all, or of any of the matters aforeſaid, ſhould be and remain in full force and virtue: And the ſaid biſhop in fact ſays, that the ſaid agreement being ſo made as aforeſaid, the ſaid *Lewis Diſney* did afterwards, to wit, on the ſame day and year laſt aforeſaid, at *Woodham Walter* aforeſaid, in the county aforeſaid, in purſuance thereof, corruptly, ſimoniacally, and unlawfully, and againſt the form of the ſtatute in that caſe made and provided, preſent the ſaid *John Eyre*, his clerk, to the ſaid biſhop, to be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church of *Woodham Walter* aforeſaid; and the ſaid *John Eyre* did alſo, in purſuance of that agreement, afterwards on the ſame day and year laſt aforeſaid, at *Woodham Walter* aforeſaid, in the county aforeſaid, corruptly, ſimoniacally, and unlawfully, and againſt the form of the ſtatute in that caſe made and provided, ſeal, and as his act and deed, deliver to the ſaid *Lewis Diſney* a certain writing obligatory of him the ſaid *John Eyre*, whereby he the ſaid *John*

It was corruptly and ſimoniacally agreed between defendant in error and one John Eyre that defendant in error ſhould preſent him, and in conſideration thereof Eyre ſhould give defendant in error a bond with a condition that if he ſhould be admitted,

he ſhould on requeſt at any time reſign,

and procure ſuch reſignation to be accepted;

after which defendant in error preſented Eyre;

who then gave the bond;

John Eyre did become bound to the ſaid *Lewis Diſney* in the ſaid penal ſum of 3000l. and with ſuch condition thereunder written for making void the ſame as is herein abovementioned to have in that behalf agreed upon by and between the ſaid *John Eyre* and the ſaid *Lewis Diſney*; and which ſaid writing obligatory, with ſuch condition thereunder written, as aforeſaid, the ſaid *Lewis Diſney*, then and there corruptly, ſimoniacally, unlawfully, and againſt the form of the ſtatute in that caſe made and provided, accepted of and from the ſaid *John Eyre*, to wit, at *Woodham Walter* aforeſaid, in the county aforeſaid; by means of which ſaid premiſſes, and by force of the ſtatute, the ſaid preſentation of the ſaid *John Eyre*, by the ſaid *Lewis Diſney* ſo made as aforeſaid, became and was and is altogether void in law; and the ſaid biſhop, by reaſon thereof, did not nor could admit, inſtitute, or induct, nor by law ought to have admitted, inſtituted, or inducted, nor yet by law ought to admit, inſtitute, or induct, the ſaid *John Eyre* into the ſaid church, upon or by virtue of that preſentation: And this the ſaid biſhop is ready to verify, wherefore he prays judgment, if the ſaid *Lewis Diſney* ought to have or maintain his aforeſaid action thereof againſt him, *&c.*

by means whereof the preſentation became void;

ſo biſhop could not admit him.

The biſhop's ſecond plea.

And for further plea in this behalf the ſaid biſhop, by leave of the court here for this purpoſe firſt had and obtained, according to the form of the ſtatute in ſuch caſe made and provided, ſays that the ſaid *Lewis Diſney* ought not to have or maintain his aforeſaid action thereof againſt him; becauſe he ſays, that the ſaid church of *Woodham Walter*, in the ſaid county of *Eſſex*, is within his dioceſe of *London*, and that he hath not nor claims to have any thing in the ſame church, or in the advowſon thereof, but the admiſſion, inſtitution, and induction of perſons to that church, and what elſe to him does of right belong and appertain, as being the ordinary of that church, and that the ſaid church is a benefice with cure of ſouls; and that the ſame having ſo become vacant by the death of the ſaid *Foote Gower*, as in the ſaid declaration is mentioned, afterwards and whilſt the ſame was and continued ſo vacant as aforeſaid, (to wit) on the ſaid 2d day of *January* in the ſaid year of our Lord 1781, at *Woodham Walter* aforeſaid, in the county aforeſaid, it was, for the purpoſe of inveſting the ſaid *Lewis Diſney* with an undue influence, power, and controul over the ſaid *John Eyre*, as rector of the ſaid rectory and pariſh church of *Woodham Walter* aforeſaid, in caſe the ſaid *John Eyre* ſhould, upon ſuch preſentation to be made by him

2d Jan. 1781. It was, for the purpoſe of inveſting the defendant in error with fluence, power, and controul, in caſe Eyre ſhould be admitted,

him the ſaid *Lewis Diſney*, as is herein after mentioned, be admitted, inſtituted, and inducted into the ſame, agreed by and between the ſaid *Lewis Diſney* and the ſaid *John Eyre*, that he the ſaid *Lewis Diſney* ſhould preſent the ſaid *John Eyre*, his clerk, to that church, ſo being vacant as aforeſaid; and that the ſaid *John Eyre* ſhould, in conſideration of ſuch preſentation, ſeal, and as his act and deed deliver to the ſaid *Lewis Diſney* a certain writing obligatory, whereby the ſaid *John Eyre* ſhould become bound to the ſaid *Lewis Diſney* in the penal ſum of 3000l. of lawful money of *Great Britain*, with a condition thereunder written, that in caſe the ſaid *John Eyre* ſhould be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church of *Woodham Walter* aforeſaid, upon the preſentation of the ſaid *Lewis Diſney*, as aforeſaid, then if he the ſaid *John Eyre* ſhould and did at any time thereafter, upon the requeſt of the ſaid *Lewis Diſney*, his heirs or aſſigns, abſolutely reſign the ſaid rectory or pariſh church of *Woodham Walter*, aforeſaid, into the hands of the biſhop of *London* for the time being, and ſhould and did give notice of ſuch reſignation to the ſaid *Lewis Diſney*, his heirs or aſſigns, and alſo did and ſhould procure ſuch reſignation to be accepted, ſo that the ſaid rectory and pariſh church might thereby become vacant, and the ſaid *Lewis Diſney*, his heirs or aſſigns, be at liberty to preſent anew thereto, then that the ſaid writing obligatory ſhould be void; but if default ſhould happen to be made in the performance of all or any of the matters aforeſaid, ſhould be and remain in full force and virtue. And the ſaid biſhop in fact further ſays, that the ſaid agreement being ſo made as aforeſaid, the ſaid *Lewis Diſney* did afterwards, (to wit) on the ſame day and year laſt aforeſaid, at *Woodham Walter* aforeſaid, in the county aforeſaid, in purſuance of that agreement, preſent the ſaid *John Eyre*, his clerk, to the ſaid biſhop, to be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church of *Woodham Walter* aforeſaid; and that the ſaid *John Eyre* did alſo, in purſuance of that agreement, afterwards on the ſame day and year laſt aforeſaid, at *Woodham Walter* aforeſaid, in the county aforeſaid, ſeal, and as his act and deed deliver unto the ſaid *Lewis Diſney*, a certain writing obligatory of him the ſaid *John Eyre*, whereby the ſaid *John Eyre* became bound to the ſaid *Lewis Diſney* in the ſaid penal ſum of 3000l. and with ſuch very condition for making void the ſame, as herein above mentioned to have been in that behalf particularly agreed upon, by and between the ſaid

agreed between them, that defendant in error ſhould preſent Eyre, and in conſideration thereof Eyre ſhould give a bond,

to reſign upon requeſt:

That the defendant in error preſented Eyre,

who gave ſuch bond.

John

John Eyre and the ſaid *Lewis Diſney*; and which ſaid writing obligatory, with ſuch condition thereunder written, as aforeſaid, the ſaid *Lewis Diſney* then and there accepted of and from the ſaid *John Eyre*, to wit, at *Woodham Walter* aforeſaid, in the county aforeſaid. And the ſaid biſhop further ſays, that upon ſuch preſentation of the ſaid *John Eyre* to him the ſaid biſhop, for the purpoſe aforeſaid made, he the ſaid biſhop did then and there, as ordinary of the ſaid church, duly inquire concerning the fitneſs of the ſaid *John Eyre*, to be by him admitted, inſtituted, and inducted into the ſaid rectory and pariſh church; and that upon ſuch inquiry in that behalf made, the ſaid biſhop did fully diſcover and find out, that the ſaid *John Eyre* had ſealed, and as his act and deed delivered to the ſaid *Lewis Diſney*, ſuch writing obligatory as aforeſaid, made in ſuch penal ſum, and with ſuch condition thereunder written, for making void the ſame, as is herein abovementioned; and that by means thereof, the ſaid *Lewis Diſney* would have acquired, and had an undue influence, power, and controul over the ſaid *John Eyre*, as rector of the rectory and pariſh church of *Woodham Walter* aforeſaid, if he the ſaid biſhop had upon ſuch preſentation admitted, inſtituted, and inducted the ſaid *John Eyre* into the rectory and pariſh church of *Woodham Walter* aforeſaid; and by reaſon of the premiſſes the ſaid *John Eyre* then and there became and was an unfit perſon to be by him the ſaid biſhop admitted, inſtituted, or inducted into the ſaid rectory and pariſh church of *Woodham Walter* aforeſaid, upon or by virtue of that preſentation: Wherefore the ſaid biſhop did then and there, as ordinary of that church, and as he lawfully might, and of right ought, wholly refuſe to admit, inſtitute, or induct the ſaid *John Eyre* into the ſaid church, ſo being vacant as aforeſaid: And this the ſaid biſhop is ready to verify; wherefore he prays judgment, if the ſaid *Lewis Diſney* ought to have and maintain his aforeſaid action thereof againſt him.

That the biſhop made due inquiry into the fitneſs of Eyre, and found out that Eyre had given ſuch bond,

and by means thereof the defendant in error would have had an undue influence over Eyre, if the biſhop had admitted Eyre;

who by reaſon thereof was an unfit perſon;

ſo the biſhop refuſed to admit him.

Defendant in error demurred to the above pleas.

The defendant in error demurred to the above pleas, as being inſufficient to authorize the biſhop to refuſe to admit *Eyre*.

To the firſt plea the defendant in error put in a general demurrer.

To the ſecond plea he put in a demurrer; and alſo pointed out the following ſpecial cauſes of objection to that plea:

And

And for cauſes of demurrer in law, according to the ſtatute, the ſaid *Lewis Diſney* ſhews to the court here the following cauſes: For that there is no ſpecification of the undue influence, or power, or controul, mentioned in the ſaid ſecond plea, with which the ſaid *Lewis Diſney* was propoſed to be inveſted, over the ſaid *John Eyre*, as rector of the rectory, to which the ſaid *Lewis Diſney* could give any anſwer, or upon which a proper iſſue could be joined to be tried by a jury: And alſo for this, that it is not in that plea alledged how and in what manner the ſaid *John Eyre* was or did become a perſon unfit to be admitted, inſtituted, and inducted into the ſaid rectory and pariſh church, ſo that any iſſue could be taken upon ſuch allegation of his unfitneſs.

Cauſes aſſigned of demurrer.

Undue influence not ſpecified.

Not ſhewn in what the clerk was unfit.

The now plaintiff in error joined in demurrer; and after argument at the bar, the court of *Common Pleas* gave the following judgment:

Judgment in the Common Pleas upon the demurrer.

And hereupon the ſaid pleas of the ſaid biſhop, above pleaded in bar, being ſeen, and by the juſtices here fully underſtood, and it ſeeming to the ſaid juſtices here, that the ſaid pleas in manner and form above pleaded, and the matters therein contained, are not, nor is either of them, ſufficient in law to bar the ſaid *Lewis Diſney* from having and maintaining his ſaid action thereof, againſt him the ſaid biſhop: It is therefore conſidered, that the ſaid *Lewis Diſney* do recover againſt the ſaid biſhop, his preſentation to the ſaid church; and that he have a writ to the ſaid biſhop, that, notwithſtanding any thing in the ſaid pleas contained, or in either of them, he do admit a fit perſon to the ſaid church, at the preſentation of the ſaid *Lewis Diſney*, *&c.*

Judgment ſigned 13th April, 1782.

Upon this judgment the biſhop brought a writ of error in the court of *King's Bench*, where, upon argument at the bar, the judgment of the court of *Common Pleas* was affirmed, as follows:

Writ of error in the King's Bench

Whereupon the ſaid court having ſeen and fully underſtood all and ſingular the premiſſes, and having diligently examined and inſpected, as well the record and proceſs and the judgment upon them given, as the ſaid cauſes and matters above aſſigned for error by the ſaid biſhop, it appears unto the ſaid court, that there is not any error in the record and proceſs aforeſaid, or in giving the ſaid judgment; and that the ſaid record was not in any wiſe vitious or defective: Therefore, it is conſidered, that the ſaid judgment be in all things affirmed, and ſtand in its

Judgment affirmed in King's Bench, 13th Dec. 1782.

full force and effect; the ſaid cauſes and matters above aſſigned for error in any wiſe notwithſtanding.

And it is further conſidered, that the ſaid *Lewis Diſney Ffytche* recover againſt the ſaid biſhop 22l. 10s. adjudged by the ſaid court to the ſaid *Lewis Diſney Ffytche*, according to the form of the ſtatute, &c. for his coſts, charges, and damages, which he hath ſuſtained by reaſon of the delay of execution of the ſaid judgment, by the proſecution of the ſaid writ of error; and that the ſaid *Lewis Diſney Ffytche* have execution thereof.

For a note upon this paragraph, ſee the Appendix.

Before the commencement of this action, the biſhop had a full account given him of this bond, and every circumſtance relating to it; and before any pleas were put in, he filed a bill in *Chancery* againſt the patron for a diſcovery, upon various ſuggeſtions of illegal circumſtances attending the giving of this bond, which were all denied, and the ſole ground for giving it diſcloſed in the defendant's anſwer.

The biſhop of *London* has brought a writ of error in parliament, in order to reverſe the above judgments.—But the defendant in error humbly hopes the above judgment given in the *King's Bench* will be affirmed, for the following, among other

REASONS:

STATUTES on this ſubject.
31 Eliz. c. 6.
1 Wm. 3. c. 16.
12 Anne, ſt. 2. c. 12.

Caſes.
Babington and Wood, Cro. Car. 180, 5th Car. 1.
Watſon and Baker, 21 and 22 Car. 2.
Sir Tho. Ray, 175
1 Sid. ——— 387.
Durſton and Sands, 2 Jam. II. Vern. 411, and 2d Chan. Ca. 186. Peele and E. Carliſle, 6 Geo. 1. Str. 227.

BECAUSE this is a new attempt to queſtion the ſettled law of the land; namely, Whether a bond given by the preſentee to the patron, with a condition to reſign upon requeſt, which is termed, a general reſignation bond, ſimple and unattended with any other fact or circumſtance, be corrupt, ſimoniacal, and againſt the ſtatute of *Elizabeth*?—This has been queſtioned, and repeatedly determined in *Weſtminſter-hall* to be legal, and not ſimoniacal.

It was looked upon to be ſo well ſettled and eſtabliſhed, that in *Heſketh* and *Gray*, 28 *G.* 2. the court would not ſuffer the counſel to argue againſt the validity of ſuch a bond.

Such a bond may be abuſed, it may be corrupt, ſimoniacal, and againſt the ſtatute:—It may be given upon a preceding ſtipulation of gain, &c. or after it is innocently given, it may be uſed by the obligee for the purpoſe of withholding tithes,

or deriving ſome pecuniary advantage to himſelf: —And if there be only grounds to ſuſpect ſuch practices, a bill may be filed for a diſcovery; and it is admitted, that (when ſuch illegal facts are alledged and proved) ſuch a bond cannot be enforced in a court of juſtice: But the courts of juſtice never interfere upon poſſibilities; they never interfere but when ſuch abuſe appears, and is ſpecified and alledged in the pleadings, in order to be proved, if denied.

Heſketh and Gray, 28 Geo. 1. 2d Burn Eccleſiaſtical law, 342. Wyndham and Bowen, Say 141

And the biſhop, in this caſe, is preciſely in the ſame predicament with the clerk in all the other caſes; he has the ſame advantage of filing a bill for a diſcovery of ſuch illegal fact, and of pleading it when he has ſo diſcovered it; and has had it in the preſent caſe.

But the bond in the preſent caſe is a mere ſimple reſignation bond, unattended with any ſuch illegal circumſtance; every ſuch circumſtance ſuggeſted by a bill for a diſcovery, has been denied; no ſuch abuſe is ſpecified in the firſt plea; and therefore the cauſe therein alledged by the biſhop is not ſufficient for him to refuſe the clerk.

The ſame reaſoning may be applied to the ſecond plea. The poſſible abuſe of ſuch a bond, *viz.* That he would have acquired and had undue influence, power, and controul over the clerk, if he had admitted him:—So alſo, as to the unfitneſs of the clerk. —But in order for the courts to interfere, the undue influence muſt have happened;—it muſt then be ſpecified and alledged in the plea, in order for the court of juſtice to interfere:—The unfitneſs, in like manner, muſt be ſpecified and alledged, in order to be proved:—But the bond in the preſent caſe was unattended with any ſuch circumſtance; and therefore, neither any undue influence or unfitneſs is ſpecified in the ſecond plea, to have attended the preſentation; conſequently the cauſe here alledged is not ſufficient for the biſhop to refuſe the clerk.

As to the propriety of ſpecifying the unfitneſs, it may be obſerved, that the judgment of the biſhop is ſubject to review;—he cannot refuſe *ad libitum*; he muſt aſſign his cauſe of refuſal; for every fact of unfitneſs may be queſtioned and tried in a temporal court, except literature, and that is ſubject to the review of the metropolitan.

Upon the whole, there is no fact alledged in the pleadings of illegal uſe in giving the bond, or of undue influence, or unfitneſs in the clerk to be admitted, *&c.* beſides the mere naked giving of the bond: Wherefore, for the reaſons above, and other reaſons to be offered at your lordſhip's bar, it is humbly hoped the judgment of the court of *King's Bench* will be affirmed.

LL. KENYON.
THO. WALKER.

After hearing counſel on *Friday*, *May* the 23d, 1783, the twelve queſtions, herein after mentioned, were put to the judges by the lords:—Ten on the motion of lord *Thurlow*, and the 11th and 12th on that of the earl of *Mansfield*; and then the further conſideration of the cauſe was adjourned to *Monday*, *May* the 26th, when the houſe being informed, that the judges differed in opinion, they were directed to deliver their opinions *ſeriatim*, with their reaſons. And accordingly, five of the judges preſent, namely, Mr. juſtice *Heath*, Mr. juſtice *Buller*, Mr. baron *Perryn*, Mr. baron *Eyre*, and Mr. juſtice *Nares*, delivered their opinions; and then the houſe adjourned to *Wedneſday*, the 28th of *May*, when Mr. juſtice *Willes*, Mr. juſtice *Gould*, and lord chief baron *Skynner*, delivered their opinions; and then the lords appointed *Friday* the 30th, for the further conſideration of this cauſe; on which day the biſhops of *Saliſbury*, *Bangor*, *Llandaff*, and *Glouceſter* ſpoke; as did likewiſe lord *Thurlow*, the earl of *Mansfield*, and the duke of *Richmond*.

Then it was ordered and adjudged, that the judgment given in the court of *King's Bench*, affirming a judgment given in the court of *Common Pleas*, be reverſed. On a diviſion the numbers were 19 for reverſing, and 18 againſt it.

The twelve queſtions put to, and the anſwers of, the judges, were as follow:

1. WHETHER an agreement made between the incumbent, on a benefice with cure of ſouls, and the patron thereof, whereby ſuch incumbent undertakes to avoid the ſaid benefice, at the requeſt of ſuch patron, be not an agreement for a *benefit* to the ſaid patron?

2. Whether

2. Whether, if a patron ſhall preſent any parſon to any benefice with cure of ſouls, for or by reaſon of any ſuch agreement, ſuch preſentation will not be void?
3. Whether a bond given by the incumbent, on a benefice with cure of ſouls, to the patron thereof, in the ſum of 3000l. defeaſible only by the ſaid incumbent avoiding the ſaid benefice, at the requeſt of the ſaid patron, (whether the value of the incumbency be greater or leſs than the ſaid ſum of 3000l.) be not a bond for ſecuring a benefit to the ſaid patron?
4. Whether, if a patron ſhall preſent any parſon to any benefice with cure of ſouls, for or by reaſon of any ſuch bond, ſuch preſentation will not be void?
5. Whether the ordinary of a dioceſe, wherein any benefice with cure of ſouls lies, be compellable in law to accept the reſignation of the incumbent thereof, in a caſe where the reſignation ſhould appear to be not ſpontaneous, but at the inſtance of another, and under the coercion of a bond to pay money in caſe of a neglect or refuſal to reſign?
6. Whether a bond given by the incumbent, on a benefice with cure of ſouls, to the patron thereof, in the ſum of 3000l. defeaſible only by ſuch act as afterwards to be done by the ordinary, be not a bond for the benefit of the ſaid patron in reſpect of the contingency, which ſuch incumbent cannot controul?
7. Whether, if a patron ſhall preſent any parſon to any benefice with cure of ſouls, for or by reaſon of any ſuch laſt mentioned bond, ſuch preſentation will not be void?
8. Whether the unfitneſs of the clerk of the defendant in error, in the ſecond plea mentioned, be alledged with ſufficient certainty?
9. Whether the ſaid ſecond plea be ſufficient in law to bar the defendant in error from maintaining his action?
10. Whether the unfitneſs in the ſaid ſecond plea ſet forth is traverſable?
11. Whether the excuſe alledged upon this record, for not admitting, inſtituting, and inducting the clerk of the defendant in error, is ſufficient in law?
12. Whether the bond ſtated in either of the pleas is good and valid, or corrupt and void in law?

ANSWERS of the JUDGES.

Six of the judges, *viz.* Mr. juſtice *Heath*, Mr. juſtice *Buller*, Mr. juſtice *Nares*, Mr. juſtice *Willes*, Mr. juſtice *Gould*, and the Lord Chief Baron, were ſeverally heard to deliver their opinions upon the ſaid queſtions as follow:

To the 1ſt Queſtion. THAT the agreement ſtated in this caſe is not an agreement for a benefit to the patron within the meaning of the ſtatute.

To the 2d. That if the patron preſent for or by reaſon of ſuch an agreement, the preſentation will not be void.

To the 3d. That giving ſuch a bond does not ſecure a corrupt or illegal benefit to the patron, being only intended to enforce the reſignation of the benefice, and that the being obliged to have recourſe to the penalty of the bond will be no benefit to the patron, within the intent and meaning of the ſtatute.

To the 4th. That if the patron preſent to a benefice for or by reaſon of ſuch bond, ſuch preſentation will not be void.

To the 5th. That it not being a queſtion made in the courts below, nor ever argued at their lordſhips' bar, they beg leave to decline giving any opinion upon it.

To the 6th. Whether the incumbent can compel the ordinary to accept of the reſignation or not, they were of opinion, 'tis not a corrupt benefit to the patron.

To the 7th. That this is anſwered by what was ſaid to the 4th queſtion.

To the 8th. That the unfitneſs of the defendant in error's clerk is not alledged with ſufficient certainty.

To the 9th. That the plea is not ſufficient in law to bar the defendant in error.

To the 10th. That the unfitneſs, as ſet forth in the plea, is not traverſable.

To the 11th. That the excuſe alledged upon this record, for not admitting, inſtituting, and inducting the defendant's clerk, is not ſufficient in law.

To the 12th. That the bond ſtated in the pleas is good and valid in law.

Then

Then Mr. baron *Perryn* delivered his opinion, upon the ſaid queſtions, as follow:

To the 1ſt Queſtion. That it is a benefit, but not *corrupt*, within *ſtat.* 31 *Eliz. cap.* 6. *ſec.* 5.

To the 2*d.* That ſuch preſentation will not be void, within the intention and meaning of the ſtatute.

To the 3*d.* That it is a bond for ſecuring a benefit to the patron.

To the 4*th.* That notwithſtanding a patron does preſent, by reaſon of ſuch bond, ſuch preſentation will not be void.

To the 5*th.* That the ordinary is compellable to accept the reſignation in the caſe ſtated, unleſs he can ſhew a ſimoniacal or corrupt agreement, or other ſufficient cauſe to the contrary.

To the 6*th.* Whether the incumbent can, or cannot controul, in the caſe ſtated, ſuch bond is a benefit, but not a corrupt one, within the meaning of the ſtat. 31 *Eliz.*

To the 7*th.* That if a patron does preſent for or by reaſon of ſuch laſt mentioned bond, ſuch preſentation will not be void.

To the 8*th*, 9*th*, *and* 10*th*, *on the ſecond plea.* That the unfitneſs of the defendant in error's clerk, in the ſecond plea mentioned, is not alledged with ſufficient certainty.——That the ſaid plea is not ſufficient in law to bar the defendant in error from maintaining his action; and that the unfitneſs in the ſaid plea ſet forth, is not traverſable.

To the 11*th and* 12*th.* That the excuſe alledged upon this record, for not admitting, inſtituting, and inducting the clerk of the defendant in error, is not ſufficient in law; and that the bond ſtated in the plea is good and valid in law.

Then Mr. baron *Eyre* delivered his opinion, upon the ſaid queſtions, as follow:

To the 1ſt Queſtion. That it is an agreement for a benefit.

To the 2*d.* That it does avoid the preſentation.

To the 3*d.* That the bond is a benefit.

To the 4*th.* That it does avoid the preſentation.

To the 5*th.* No anſwer.

To the 6*th.* Aſſuming that the biſhop may refuſe, it is a benefit in reſpect, *&c.*

To the 7*th.* Aſſuming, *&c.* It does avoid the preſentation.

To the 8*th.* That the unfitneſs is not alledged with ſufficient certainty.

To the 9*th.* That the ſecond plea is not ſufficient in law, *&c.*

To the 10*th.* That the unfitneſs in the ſecond plea ſet forth, as ſet forth, is not traverſable.

To the 11*th.* That the excuſe in the firſt plea is ſufficient, and the excuſe in the ſecond plea not ſufficient.

To the 12*th.* Upon theſe pleadings it is not competent for the plaintiff in error to object to the validity of the bonds ſtated in the pleadings, and therefore they are to be taken to be good and valid, and not corrupt and void in law.

Arguments of the JUDGES.

Mr. juſtice *Heath* ſaid, that the four firſt queſtions were intimately connected with each other, and therefore he would conſider them together. (*See page* 70.) The common law, he obſerved, conſiders advowſons as a ſpecies of real property, incorporeal rights; which from the earlieſt times have been objects of commerce, and under every modification of real property, not only tranſmiſſible from hand to hand, but, it is admitted, they have been the ſubjects of future grants.—By the old law, it is true, that a preſentation to a void living ſhould be *gratuitous*; and if the preſentation to ſuch a benefice ſhould be ſold, it would not paſs, becauſe ſuch a ſale was ſimoniacal.—But now the law permits the patron to make every poſſible advantage of an advowſon; but conſiders him incompetent to determine upon the idoneity of the clerk, and conſtitutes the biſhop the ſole judge of *his* qualification, in order that under the ſuperintendence of the ordinary the public may be ſecure, that no illiterate or unqualified perſon may be admitted to the diſcharge of ſuch a ſacred truſt.—The policy of the law has admitted advowſons to be objects of commerce, with no other view than to admit the purchaſers of them to provide for children, friends, and relations.

In

In the caſe of *Lawrence* and *Jones* (*ſee page* 15) it was ſaid to be *good policy*, as it was intended to provide for the child of the obligee.

It is agreed by the judges, that theſe general bonds of reſignation are valid and effectual in law; and they have been eſtabliſhed by a long ſeries of deciſions for near two centuries; ſo that at this day they cannot be called in queſtion.

The firſt caſe of *Lawrence* and *Jones* (*ſee page* 15) was determined twenty-eight years after the ſtatute againſt Simony. It was firſt determined in the king's bench; from thence it went by writ of error to the court of *Exchequer Chamber*, and there it was unanimouſly decided by all the judges, that ſuch bond was good.

Although this determination was twenty-eight years after the enacting of the ſtatute, it may be conſidered as a cotemporary expoſition, and cotemporary expoſitions have always had the greateſt weight.

At that time lord *Coke* preſided in the court of *King's Bench*, and Sir *Henry Hobart* in the *Common Pleas*: Lord *Coke*, in his reading upon the ſtatute againſt Simony, ſays he was a member of parliament at the time when that act paſſed, and that he noted well the proceedings of the houſe, and yet he concurred in opinion with the other judges, that ſuch bond was valid.

But there was a difference of opinion, whether the deciſions upon theſe bonds were applicable to the preſent queſtion? And whether the preſentation being purchaſed by the bond is not void as being a *benefit* within the true intent and meaning of the ſtatute; in the preamble of which (*ſee page* 4) it is expreſſed, to be made for the avoiding of ſimoniacal and corrupt preſentations to benefices, *&c.* In truth it is only an amplification of two canons to be found in *Lyndewood*, 108 and 281. There can be no reaſon why a ſtricter conſtruction ſhould be given to ſtatutes than the canoniſts themſelves have given to canons; and the ſtatute avoids the preſentation, when any perſon is preſented by reaſon of any reward, profit, or benefit whatever.

The *literal* conſtruction of the ſtatute has *never* been adhered to; for inſtance, a patron derives a benefit by a preſentation to his ſon, and ſaves a portion for a younger child, which is an advantage to him; or a biſhop rewards the meritorious ſervices of a chaplain by preſenting him to a living, which is a profit, and by reaſon of which the preſentation is made; *that* was never held to be ſimoniacal by canoniſts or common lawyers.

Ano-

Mr. juſtice *Buller* argued, that as the laſt queſtion went to the general point of law, reſpecting the legality of a general reſignation bond, and many of the other queſtions ſeemed to be conſequences of that, he ſhould beg leave to anſwer that queſtion firſt.

He ſaid he had taken no ſmall pains to find out upon what principle all theſe caſes have gone; but he muſt ſay it has not been with much effect; for he could not find that the different authorities which were upon this ſubject are ſupported by that ſenſe, by that reaſon, or by that principle, which, if the caſe were now totally *new*, would govern him in his judgment, or induce him to concur in thoſe deciſions. But the authorities are ſo very numerous; they have ariſen at ſo many different periods of time; all the judges for nearly two hundred years paſt have been ſo uniformly of the ſame opinion; the law has been received not only in *Weſtminſter-hall*, but throughout the whole kingdom as perfectly ſettled, and mankind have ſo uniformly acted upon this idea, that it ſeemed to him, it would be very dangerous to overturn, or even to ſhake thoſe autho rities: For if policy, private wiſhes, or the hardſhips of a caſe were permitted to weigh down judicial determinations in one inſtance, they might be extended to any other, and the law, inſtead of being a *certain* rule, would be governed by a diſcretion to be exerciſed without rule in each particular caſe which comes in judgment.

The bond in queſtion is a bond with a condition to reſign upon requeſt; and it is ſtated in the pleadings, that it was corruptly agreed between Mr. *Eyre* and Mr. *Ffytche*, that Mr. *Ffytche* ſhould preſent Mr. *Eyre*, and in conſequence thereof, Mr. *Eyre* ſhould give this bond to *Ffytche*.

The queſtion is, whether ſuch a bond be corrupt and illegal?

The authorities one and all have determined, that ſuch a bond is good: And this has been decided not only in caſes where it might be ſuppoſed, that the bond was given *after* the preſentation, and without any *previous* agreement, but in caſes where it did appear, that the bond was given *before* the preſentation, and that the preſentation was made in conſideration of that bond.

In the caſe of *Webb* and *Hargrave*, (*ſee page* 41) it appeared from the condition that the patron had not preſented, but upon the terms of the bond; and yet the bond was held good.

This

This is not the firſt caſe that aroſe upon the ſubject of reſignation bonds after the making the ſtatute of 31ſt of *Elizabeth:* This caſe was in the 43d of *Elizabeth.* But even ſo early as the 40th of *Elizabeth*, there is the caſe of *Oldbury* and *Gregory*, (*ſee page* 14) in which it was held ſuch a bond was good. This was but nine years after the act. From that time to this, there have been a variety of caſes which have determined thoſe bonds to be good, and not exceptionable.

Before parting with this queſtion, he would take notice that even at common law, and long before the ſtatute, theſe bonds were in uſe. It appears ſo early as in the 14th year of *Henry* IV; that an action of debt was brought againſt the parſon by the prior, who demanded 100 l. upon a bond; the obligation of the condition was, that if the parſon ſhould reſign his church within a certain time to the prior for a certain penſion to be agreed upon, the obligation to be void.

In this caſe a ſum of money was ſtipulated for an annuity in conſideration of the reſignation and yet there is not in that caſe a word ſaid objecting to the legality of ſuch bond. He had only one caſe more to mention upon this ſubject, to ſhew the ground mentioned before that the courts of law have made no diſtinction in the caſes whether the bond was given *before* the preſentation or *after*, and that is the caſe of *Babington* and *Wood*; (*ſee page* 16) there alſo the bond recited, that plaintiff intended to preſent defendant. In the other caſes, it was thought ſo immaterial, whether the bond was given before or after the preſentation, that the books are quite ſilent about it; but the point decided in all is: That the bond is good and valid, and is not corrupt or void in law, which is the anſwer he would give to the *laſt* queſtion.

Two caſes he ſaid were mentioned at the bar from books which are by no means of authority, and, unleſs his memory greatly deceived him, both thoſe books have been forbid to be cited in *Weſtminſter-hall*; they are *Comberbach* and *Noy*: The caſes cited from them are ſo looſe, it is, impoſſible to collect any thing from them.

As to that in *Comberbach* (*ſee page* 21) there is no ſtate whatever of the caſe then in judgment; it is merely a looſe note without any caſe to ſupport it; a mere *dictum* ſuppoſed to be made uſe of by lord chief juſtice *Holt*, who ſays, *&c.* *See page* 21.

This is merely a *dictum:* In what caſe it happened is not at all ſtated; and however much he might diſapprove of it; yet if that expreſſion was uſed in a caſe ariſi-

upon reſignation bond, it is moſt probable, *that* determination followed the fate of all the others before mentioned: It only ſhews, that lord *Holt* at that time held the ſame opinion he [Mr. juſtice *Buller*] did now, namely, that, after ſuch a vaſt train of deciſions, it is not competent to the judges to excerciſe their judgments upon the queſtion.

The caſe in *Noy* ſeemed to him full as looſe. (*See page* 16.) How the queſtion aroſe there does not appear; it is merely a *dictum* of ſomething that paſſed at *niſi prius*; he had not ſeen the record; but he underſtood, ſome of his brethren would give their lordſhips a fuller account of it than he was able to do.

The 1ſt and 2d queſtions are conſequences of that juſt anſwered; for it is determined by all theſe caſes, that ſuch a bond is not a *benefit* within the meaning of the ſtatute of queen *Elizabeth*: If it were a benefit within that ſtatute, the bond itſelf would be void; for tho' this ſtatute ſays the preſentation itſelf ſhall be void, yet by operation of law upon the ſtatute all conſiderations given for a cauſe prohibited by the ſtatute will be void.

This was ſo laid down in *Bartlett* and *Viner*'s caſe in *Carthew* 282. (*See page* 19.) It is obſervable in that caſe lord chief juſtice *Holt* expreſsly mentions the caſe of Simony; for my lord chief juſtice *Holt* ſays, every contract, *&c.* *See page* 19.

This authority never has been contradicted; but on the contrary has always been received as the rule which ought to govern in all ſimilar caſes; the agreement not being a *benefit* within the meaning of the ſtatute, a preſentation by reaſon of ſuch agreement will not be void.

If the preſentation be void, it muſt be ſo becauſe it is made upon a corrupt agreement; there is no agreement ſtated, but that ſuch a bond ſhould be given: The law has ſaid that it is not corrupt; for if the bond itſelf be not corrupt, the agreement to give that bond cannot be ſo, and conſequently this preſentation is not void.

His anſwer to the 3d queſtion was governed by that which was given to the firſt; it differed from the firſt queſtion only in ſuppoſing the penalty to be in a certain ſum mentioned, and requiring to know, if there be no difference in law, whether the value of the incumbency be greater or leſs than the penalty of the bond. The amount of the penalty, whether more or leſs than the value of the incumbency, will make no difference, if given for the purpoſe of compelling the reſignation; for it is declared by law to be legal; but if it be under an agreement expreſſed or tacitly underſtood, that the incumbent ſhould pay the money, and

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ſhould not reſign, that would be in effect the ſale of a living, and then the bond would be corrupt and void. Now that does not appear upon the face of the bond, but muſt be made out by proper averments in pleading; and it muſt be either admitted upon the other ſide or found by a jury: till ſuch agreement or ſuch intended uſe be made of a bond, it is admitted all through the caſes, a bond would be good; becauſe nothing that the law calls corrupt appears upon the face of it.

To the 3d queſtion, his anſwer was, ſuch a bond is not a bond for ſecuring a benefit to the patron within the intent and meaning of the ſtatute of the 31ſt of *Elizabeth*.

For the ſame reaſon, the anſwer to the 4th queſtion is, the preſentation by reaſon of ſuch bond will not be void.

With reſpect to the 5th queſtion; he ſaid, that it has not been argued at the bar; It is a queſtion which he could not find has bee. decided in any book whatſoever, and when the queſtion is made it can be made by application to that court in which he had the honour to ſit; and therefore he hoped their lordſhips would permit him, in conformity to the requeſt of his brother *Heath*, to decline at preſent giving any anſwer to that queſtion, till he heard it argued, and could be enabled to form a more perfect opinion than he could at that time.

Lord *Thurlow* obſerved, that the 5th queſtion may be anſwered, or not, as it ſhould be conſidered to be material; he was very ready to admit, if any queſtion has been adopted by the lords, and put to the judges, and it afterwards turned out, that that queſtion did not turn the fate of the caſe before the houſe, it was not only proper but reaſonable that the queſtion ſhould be totally diſcharged; but ſomething or other he ſaid muſt be done; either their lordſhips muſt comply with what ſeemed to be the requeſt of the two learned judges, or diſcharge it from being anſwered at all. He hoped their lordſhips underſtood him to be ſpeaking without any predileſtion for the one or the other of the methods; but with reſpect purely to that dignity which was eſſentially neceſſary for their lordſhips to keep up, he took it to be the cleareſt of all propoſitions in point of order, that the queſtions of law to be put to the judges ſhould be abſolutely, excluſively, and finally in their lordſhip's breaſts only. It was not fit for their lordſhips to put queſtions here, and be told, whether the queſtions are or are not fit to be put. It was for their lordſhips to decide whether they were fit or not, and his lordſhip proteſted he had no wiſh, upon ſubjects of this kind, to urge upon the judges,

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queſtions which they ſeemed diſinclined to anſwer, but quite the contrary; but whenever it appears there is a great inclination not to anſwer any particular queſtion, muſt their lordſhips decline aſking any anſwer? If the judges go through and ſtate one by one that they do not find themſelves competent to anſwer that queſtion: If they deſire the queſtion ſhould ſtand unanſwered, unleſs it is argued; their lordſhips may deſire it to be argued again, or any part of it; but as the queſtion ſtands at preſent, it is impoſſible to go on.

Earl of *Mansfield* anſwered, that, as far as he was able, to recollect, he took the *uſage* of the houſe to be, if the judges decline anſwering any queſtion, the houſe, if they acquieſce, may proceed without any particular order whatever; if the houſe refuſe to acquieſce, which is a thing he never remembered to have happened, it muſt come to a debate or a queſtion in order to diſcharge the former order, to put that queſtion or to adhere to it; but there were many inſtances where the judges have declined anſwering a queſtion, and he remembered in the caſe of a *habeas corpus*, they declined anſwering one, and but the other day the judges declined, upon a queſtion of baſtardy, to give an anſwer to it. The houſe acquieſced. When this queſtion was propoſed he then ſuggeſted, but with great deference to the great authority which propoſed it, that in his humble apprehenſion it was not quite a proper queſtion to be put to them; it did not ariſe out of the cauſe in judgment; neither ſide had argued it; nor thought it material to the determination; nothing had been ſaid about it; and queſtions upon collateral arguments are not properly put to judges: They muſt be upon grounds from whence a concluſion is to be drawn: With reſpect to their lordſhip's coming to a reſolution by way of ordering the diſcharge of a queſtion, he did not know of any precedent for it; he believed it has gone by acquieſcence, when the judges have declined anſwering; and where ſuch queſtions would have drawn an extra-judicial opinion upon the matter, it was a ſtrong ground for their lordſhips to acquieſce: Some of the judges may give an anſwer to it; he did not know whether they would or not.

Lord *Thurlow* replied, and obſerved, that he had already ſaid, that putting particular queſtions to the judges was by no means an article upon which he entertained any anxiety, much leſs at preſent: he wiſhed at the ſame time it might be conſidered, whether it was or not conducive to the deciſion of the cauſe now depending

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ing, before their lordſhips: He was ready to agree that it was extremely unfit to give the judges the trouble of looking into the matter; it was extremely unfit for their lordſhips to put any queſtions to the judges that did in no manner conduce to anſwer the queſtion in diſcuſſion before the houſe: It is true, no deciſion has been found upon the ſubject; he believed none could, and the reaſon why he took the liberty of propoſing the queſtion originally was this; becauſe he thought it material to determine, whether the biſhop might be underſtood, in deliberating upon accepting the reſignation or not, to be acting judicially, or as he is ſaid to be in ſome caſes, when he examines the idoneity of the parſon; he was at a loſs to know, whether the diſcretion reſts with him to chooſe whether he would or not accept the reſignation.

If a bond were given, undertaking for the act of another, over whom the obligor could have no controul, there could be no doubt that he would be liable to the penalty; if accepting the reſignation be a judicial act, the penalty would wait the event of the propriety of aſking that reſignation, and the bond would be good or bad as that propriety ſhould turn out one way or other: It ſeemed to him to be material to know what was the nature of the diſcretion reſiding with the biſhop for that purpoſe.

As no queſtion was put to the houſe to make any order upon the ſubject, the judges were deſired to proceed upon the next queſtions.

Mr. Juſtice *Buller* reſumed, and ſaid he was going to anſwer the 6th and 7th queſtions propoſed by their lordſhips. *See page* 69.

In the caſe of *Heſketh* and *Grey* (*ſee page* 22.) the obligor undertakes for the acceptance of the ordinary, and notwithſtanding that, the bond was determined to be legal: The bond being good, the preſentation by reaſon of ſuch bond will not be void.

The 8th, 9th, and 10th queſtions (*ſee page* 69.) are all applicable to the 2d plea upon this record and the ſame reaſons which decide one will alſo determine the other; and therefore he would conſider theſe three together.

The 2d plea ſtates, *&c.* (*See page* 55.)

The biſhop has ſtated in this plea only the common law-contract, and what he conceives to be the effect of

it; he has in no part of this plea ſtated the eccleſiaſtical law as the general law of the land, or even that he examined *Eyre* according to the eccleſiaſtical law, or that *Eyre* was unfit by that law, or that the biſhop, according to the eccleſiaſtical law, adjudged him unfit: This therefore, in his apprehenſion, muſt ſtand or fall as good or bad by the general law of the land.

It is a general rule of pleading, that every *material* fact muſt be ſo alleged, that it may be traverſed and put in iſſue. A concluſion of law on facts is not traverſable. What effect the bond would have had is a matter and concluſion of law; And the only fact which could have been traverſed on this plea is the agreement to give the bond in conſideration of the preſentation, or the fact of giving the bond.

Either of theſe traverſes would have been immaterial: The law has ſaid ſuch a bond is lawful, and if it be lawful, the agreement to give it muſt be ſo; and though whether the bond does give undue influence or not is a queſtion of law, you can never ſay, that a lawful bond gives an unlawful or undue influence; for if the bond had that effect, the bond itſelf would be void in point of law.

In this plea the undue influence is ſtated as a conſequence; but if it had been ſtated as a poſitive fact, it would not have varied the caſe. What is undue influence? It is a thing not to be defined, much leſs to be tried by a jury. To make ſuch a matter iſſuable, it ſhould be ſtated particularly what the influence was, and what was the particular object for which ſuch bond was given: In the caſe of *Heſketh* and *Gray*, (*ſee page* 22.) one of the pleas was the ſame as this plea upon the preſent record; and it was ſtated, that the preſentation as well as the bond were both made in conſequence and in purſuance of a corrupt agreement.

He then ſtated the pleadings in that caſe as he had them from the record itſelf: In one plea it was ſtated, that the vicarage became vacant before making the bond, and at the time of making the bond it was and continued vacant; that *Heſketh* was the patron, and it belonged to him to preſent; and thereupon it was corruptly agreed between the plaintiff and the defendant, that the plaintiff ſhould preſent the defendant to this vicarage, that he might be inſtituted and inducted therein; that *Gray* ſhould not hold the ſame nor continue parſon, notwithſtanding ſuch preſentation, longer than ſix years and three months; but ſhould deliver it up to the proper ordinary, and upon the agreement for that, he ſhould execute the bond:

bond: In purſuance of this, he did preſent *Gray* to the pariſh church, and he was inſtituted and inducted, and *Gray* in purſuance of this corrupt agreement did execute the bond.

This caſe is an authority with others that were mentioned, that in caſes where a bond is given *before* preſentation and under an agreement, and ſuch preſentation ſhould be made in conſideration of ſuch bond, it is no objection. The laſt plea was, it was in that caſe corruptly agreed between the plaintiff and the defendant, that the plaintiff ſhould preſent, but the defendant ſhould not hold the living longer than ſix years and three months: It was to keep the defendant in awe, which are the words in this plea: It was agreed the defendant ſhould ſeal and deliver this writing, and in purſuance of that corrupt agreement, he did preſent him, and he made the bond. The laſt plea ſeems in that caſe to be the ſame in ſubſtance and nearly in words as in the preſent plea, and in that it was decided by all the court the plea was bad: This plea is inſufficient; it not being alleged with ſufficient certainty; it is not traverſable, and conſequently ſuch plea is not ſufficient in law to bar the defendant in error from maintaining his action.

Whether the unfitneſs of a clerk in general may be traverſable, or any caſe can be put in iſſue to be tried by a jury; whether the objection is founded upon eccleſiaſtical law, and the biſhop has exerciſed his judgment according to that law, is a very different queſtion, and it does not ariſe in the preſent caſe; therefore he ſhould only humbly requeſt not to be underſtood to comprehend ſuch a queſtion in the anſwer that he has given to the particular unfitneſs of the clerk ſet forth upon this record.

The 11th queſtion is a conſequence of what has been ſtated in anſwer to the other queſtions, therefore he would not intrude upon their lordſhips time further than to ſay, he was of opinion, that the excuſe alleged upon this record for not admitting, inſtituting and inducting the clerk of the defendant in error, is not ſufficient in law.

Mr. Baron *Perryn* conſidered the four firſt queſtions together: The firſt is, whether, *&c.* *See page* 68.

The next queſtion is, whether, *&c.* *See page* 69.

The two next queſtions only vary from theſe by introducing the bond inſtead of mentioning the agreement. *See page* 69.

If this preſentation makes void the bond, it muſt be by force of the 31ſt of *Elizabeth*, *chap.* 6. *ſect.* 5. The word *benefit* in this act means a *corrupt* advantage gained by the patron for ſome bad purpoſe.

Now the courts of law for upwards of two centuries paſt, by an uniform ſeries of judgments by all the judges, have eſtabliſhed *general* bonds of reſignation to be valid in law.

It ſeems to be a contradiction in terms to ſay, that the bond and agreement ſhould be good, and yet the preſentation void.

There may be good conſiderations to induce a patron to preſent a parſon: if the purpoſe is not expreſſed upon the face of the agreement, it *may* ſubſiſt upon a fair and good conſideration. If it is *general*, and no purpoſe expreſſed, it *may* be for a good purpoſe.

He was of opinion this agreement is not corrupt, or a benefit within the intention and meaning of the ſtatute, and that by reaſon of ſuch agreement, the preſentation will not be void.

With reſpect to the 5th queſtion, which the learned judges who preceded him have declined to anſwer, he would give their lordſhips the beſt opinion in his power.

The queſtion is whether the ordinary of a dioceſe, &c. *See page* 69.

His opinion upon this was this; the nature of the biſhop's act in the acceptance of the reſignation ſeemed to him not to be clearly ſettled; he could find no caſe to that purpoſe, but a caſe that came before lord *Hardwicke*, which he had the honour to attend: It is the caſe of the marchioneſs of *Rockingham* and *Griffith* in *Lincoln's Inn Hall* on the 22d of *March* 1755, *ſee page* 46. Mr. *Henley*, who was afterwards lord *Northington*, was counſel in it: He ſaid the acceptance of a reſignation was a judicial act of the biſhop, and could only be proved by ſuch act as was neceſſary to prove a judicial act: Lord *Hardwicke* in giving his opinion upon that caſe ſays, I can find no authority for this, and I ſhould take it the biſhop's act may be proved; for his acceptance or denial is a judicial act, and is the proper act of a biſhop: It is a kind of act in the juriſdiction of the biſhop, though not in a judicial way, as many acts of the ordinary are: This is the opinion of one of the greateſt chancellors that ever ſat in *Weſtminſter-hall:* The ordinary may refuſe to accept the reſignation for a ſufficient cauſe: He is the perſon who in the firſt inſtance is to judge of the fitneſs of the preſentee; but he could not, as he conceived, by law, at his own

own will and pleaſure, refuſe to accept of a reſignation without any cauſe. In that caſe of *Rockingham* and *Griffith*, it is ſaid that one queſtion was, whether the ordinary was bound to accept the reſignation; Mr. *Henley* urged, that in no caſe was he bound to do it; the then attorney general (now lord *Mansfield*) was upon the other ſide, who ſaid, the plaineſt points are ſeldom called in queſtion and are ſupported by the feweſt authorities. The chancellor intimated his opinion ſtrongly, that the ordinary ought to accept it, and he afterwards did ſo: According to the caſe in 2d Chancery Reports 398 (*ſee page* 18.) and Precedents in Chancery 513 (*ſee page* 19) the ordinary is not bound to accept a reſignation where an improper uſe is made of a reſignation bond. The acts of the ordinary may be affirmed in equity; but there is no caſe goes ſo far as to prove ſo broad a propoſition as this, that the ordinary can *at any time*, and without aſſigning any reaſon, refuſe to accept a reſignation, according to the authority in 2d Inſtitutes 632. and the caſe of the biſhop of *Exeter* and *Hele* in *Shower* 88. (*ſee page* 48.) He was therefore of opinion that the ordinary was compellable to accept the reſignation in the caſe ſtated, unleſs he could ſhew good cauſe to the contrary; and his judgment in no caſe is ſufficient, but that of the clerk's being *minus ſufficiens in literatura*; and his opinion even in that caſe is ſubject to the judgment of the metropolitan, but not to any controul in the temporal courts.

2. Inſt. 632. is on refuſing a clerk preſented, not on a reſignation.

With regard to the 6th queſtion, whether a bond, *&c.* *ſee page* 69. He ſaid, if his opinion was right on the laſt queſtion, it is for the benefit of the patron, if the patron can remove him in caſe he ſhould not reſign, for improper conduct, and have the perſon which he can confide in; but it is not ſuch a benefit within the ſtatute as to make the reſignation bond void.

The 7th queſtion is whether, *&c.* *See page* 69.

He thought the bond would be good for the reaſons before given; which were founded upon ſtrong authorities.

With reſpect to the 8th, 9th, and 10th queſtions, he ſhould take them together; they depend upon the 2d plea which ſtates the undue influence. He entirely concurred in opinion with Mr. juſtice *Buller*, that the plea is inſufficient in the manner it ſtands, and in his apprehenſion no iſſue was ever joined upon ſuch a propoſition; as the party could not be prepared to meet ſo general a charge.

With regard to the 11th queſtion, whether, &c. *ſee page* 69. He was of opinion it is inſufficient for thoſe reaſons which he had already ſtated to the houſe.

In regard to the laſt queſtion whether, &c. *ſee page* 69. He was of opinion that the bond is good and valid in law.

Mr. Baron *Eyre:* He confeſſed himſelf wholly unprepared to decide upon the 5th queſtion; (*ſee page* 69.) it was extremely new, and involved in it many very important conſiderations, requiring very great deliberation, and all the aſſiſtance that an argument at the bar could furniſh, in order to enlighten the minds of the judges upon the ſubject; he really was not prepared to anſwer that queſtion, and he hoped the houſe would not expect it.

To the other queſtions, he would ſubmit ſuch anſwers, as upon the beſt conſideration of them occurred to him.

The 11th queſtion, he obſerved, was general, and led to an examination of the two pleas upon the record.

The firſt plea is: The right reverend prelate, the plaintiff in error, did not admit the clerk, becauſe the preſentation upon the bond was void. *See page* 53.

The ſecond plea is: That he did not admit him; becauſe in his judgment, he was unfit to be admitted. *See page* 55.

Here are two very different excuſes, which will require ſome diſcuſſion, and in the courſe of that diſcuſſion, the ſubject matter of the 1ſt, 2d, 3d, 4th, 6th and 7th, and of the 12th queſtions (*ſee page* 68, 69.) propoſed by their lordſhips would be conſidered as points ariſing in the caſe, made by the 1ſt plea; from the ſolution of which queſtions, the general concluſion of the ſufficiency or inſufficiency in law of that plea is to reſult.

The 8th, 9th and 10th queſtions (*ſee page* 69.) conſtitute the merits of the 2d plea.

By this method, the reaſons upon which he founded the anſwers he ſhould ſubmit to their lordſhips, would be expreſſed in fewer words, and he flattered himſelf, would be better underſtood, than if he took the conſideration of each queſtion ſeparately, and in the order in which they were put.

The plaintiff in error has in his firſt plea undertaken to maintain this ground: That whereas by the ſtatute of the 31ſt of *Elizabeth*, if a patron preſents to a benefice, for or by reaſon of any agreement, promiſe, bond or other

other aſſurance for any reward or benefit, his preſentation ſhall be void, &c. *See page* 4.

In this caſe the patron has preſented, for or by reaſon of an *agreement*, that the clerk ſhould give him a *general* bond of reſignation; which being a profit and a benefit within the ſtatute, his preſentation is void; that is the *general* queſtion upon this plea.

This queſtion is now for the *firſt* time, as far as he could learn, ſtated, in the proceedings upon this record; ſo as to be the point in judgment. It is a *new* and an important queſtion in its conſequences, and deſerves very ſerious conſideration. In the arguments at the bar, and in the courts of law from whence this cauſe comes, as far as he has been informed, it ſeems to have been *aſſumed*, that the queſtion was to be decided by the ſolving another queſtion, that is, whether a bond with a condition to reſign at the requeſt of the patron was void in law? And their lordſhips' 12th queſtion, which is upon the validity of the bond ſtated in theſe pleadings, gave a degree of countenance to that argument.

The counſel for the defendant in error reſted the whole argument upon the authority of a ſeries of caſes, in which it was ſaid to have been adjudged, that theſe bonds were good in law; the houſe was called upon *ſtare ſuper antiquas vias*, and a ſtorm of indignation was raiſed againſt all thoſe who ſhould unſettle foundations.

Without unſettling foundations, he may aſk, he ſaid, how the general doctrine, extracted from this ſeries of caſes, that a general bond of reſignation is in itſelf *not* unlawful, applies even to prove that the bond ſtated in theſe pleadings, under the *ſpecial* circumſtances of this caſe, is not unlawful: And he was compelled to go into the enquiry; becauſe the queſtion upon theſe bonds, propoſed by their lordſhips, was not any queſtion upon the validity of ſuch bonds themſelves, but was a queſtion upon their validity upon the particular caſe, and under the ſpecial circumſtances ſtated in theſe pleadings.

He had looked, he ſaid, into moſt of the caſes that have been alluded to, and found that inſtead of deciding the queſtion upon the validity of ſuch a bond, given under ſuch circumſtances, as are diſcloſed in theſe pleadings, they are expreſs authorities to prove that ſuch a queſtion remains to this hour open to diſcuſſion.

From the uniform language of the caſes, if you object to the validity of theſe bonds, you muſt take the circumſtances upon which the objection is founded, that the

court may judge whether it is ſufficient. Therefore at once to diſtinguiſh this caſe from all the caſes cited, he believed, he may hazard the aſſertion, namely, that *all* the circumſtances were ſtated for the *firſt* time upon this record.

In the caſe of *Heſket* and *Gray*, (*ſee page* 22.) the defendant made, for the firſt time, an attempt to introduce ſpecial matter upon the record. He pleaded, it was corruptly agreed, that a bond ſhould be given; the court rejected the plea, and the reaſon aſſigned for rejecting it was, the aſſertion in the plea, that the agreement was corrupt, which would not make it ſo; it ſhould be ſet forth, what ſort of corruption it was, that the court may judge, whether it was ſimoniacal or not.

From one of his learned brethren, the houſe had heard a particular ſtate of that plea; from that ſtate, thus much he learned and thought he was confident of, that it was not a plea upon the ſtatute of *Elizabeth:* It was a plea, that it was corrruptly agreed, that the patron ſhould preſent; that the clerk might be inſtitued, but that the clerk ſhould not hold it; to ſecure that agreement, the bond was given, which is a very different caſe from the agreement, that the patron ſhould preſent, and that for that preſentation the bond ſhould be given, which is a caſe that ariſes upon that ſtatute. In the preſent caſe it is ſet forth what ſort of corruption it was, that is imputed to this bond and to this preſentation: It is this ſort of corruption; the patron has made the giving a bond the *price* of his preſentation: In this reſpect, therefore, the caſe upon this bond is ſubſtantially different from any one of the adjudged caſes, and it is perfectly *new*.

The validity of this bond was, in his apprehenſion, not in iſſue between the parties upon theſe pleadings. The plea in this caſe is a plea upon the ſtatute of queen *Elizabeth*, and the plea applies not only to impeach the bond, but to impeach the preſentation which has been made in this caſe. It impeaches the preſentation, not by the medium of impeaching the bond, but by ſhewing that this bond, good or bad, was entred into under certain circumſtances, which not for their intrinſic demerit, but by force of the ſtatute of *Elizabeth*, ſhould avoid the preſentation.

As all the caſes adjudged upon reſignation bonds have been hitherto ſuſtained, becauſe they were not in fact impeached for any matter introduced *out* of the bond; ſo here the bond ſtated in theſe pleadings muſt be taken to be

be good as far as reſpects this plea, becauſe upon this plea of the ſtatute of *Elizabeth* the point of the plea does not go to impeach the bond.

The bond is called indeed, corrupt, but the perſon who pleads it, takes no concluſion of law upon that corruption, to avoid the bond; but his concluſion of law is, that by reaſon of that bond ſo given, good or bad, the preſentation is void.

He had very ſerious doubts, he ſaid, whether in ſuch a plea, and in ſuch a ſuit in *quare impedit*, it would be poſſible, by any plea that could have been introduced, to have brought the validity of that bond properly in judgment before the court, and therefore with this explanation it is, he begged leave to anſwer the 12th queſtion, namely, the bond ſtated in the *firſt* plea upon theſe pleadings muſt be taken to be good and valid, and not corrupt and void in law.

He obſerved, that, in his apprehenſion, the argument of the validity of reſignation bonds, and of the validity of preſentations, made the conſideration of ſuch bonds, is not juſt. If the caſes upon reſignation bonds do really conclude nothing to the queſtion upon the preſentations under the ſtatute of *Elizabeth*, they are but ſo much rubbiſh thrown over the queſtion, which ſhould be cleared away, that the true ground of the queſtion may be fairly ſtated to their lordſhips' view.

He was bound to undertake the labour of this work; becauſe he profeſſed not to diſturb the caſes upon reſignation bonds as far as they have gone, and he muſt therefore take upon himſelf to diſtinguiſh thoſe bonds from the caſe which is now in judgment; and he muſt ſuſtain his opinion upon the ſeveral topics, and the ſeveral queſtions which their lordſhips have been pleaſed to call upon the judges for anſwers to, upon the ground of that diſtinction.

By the ſtatute of *Elizabeth* it is enacted, that a preſentation made for profit, reward or promiſe, ſhould be void, (*ſee page* 4.) Whether before the making this ſtatute the accepting of a profit for a preſentation was *malum in ſe*, at common law, or *malum prohibitum* by the canon law, or lawful by both laws, is not material; it is now *malum prohibitum* by the ſtatute under a penalty; if it was unlawful *before*, the ſtatute is accumulative in reſpect to this penalty of avoiding the preſentation: If it was lawful before, it becomes accumulative *ſub modo*, and *quoad* the

pre-

preſentation, to the extent of rendring it void and unlawful.

In the caſe of *Oldbury* and *Gregory* (*ſee page* 14) he really thought the judges miſtook the nature of it; he rather took it to be a caſe for the payment of a ſum of money, and not a condition to reſign; that caſe was preciſely the caſe he ſhould have put; it was a caſe on condition to pay a ſum of money at a day certain; the defendant pleaded that the money was agreed to be paid for the reſignation of the benefice by the parſon, to the intent that another ſhould be preſented to it, and ſhewed that the parſon and the patron, the obligor and the obligee, were parties to that agreement; it was therefore demanded of the judges, whether upon the contract being ſimoniacal and againſt law, this ſhould avoid the bond? The plaintiff demurred, and it was adjudged for the plaintiff, becauſe Simony is not againſt our law, nor is any contract or obligation of this kind made void by any ſtatute in our law; alſo the caſe does not ſhew that the money was for any other cauſe than the bond expreſſes: The condition was to pay a ſum of money: they attempted to aver by the plea what the true conſideration was. That caſe has been in modern times treated ſomewhat harſhly; it has been ſaid not to be law, (*ſee page* 14) except it falls into the common error of denying there could be any averment againſt the bond, he was extremely inclined to agree to the law of that caſe, that Simony is not againſt our law, and that there is not any contract or obligation againſt Simony made void by any ſtatute in our law: Such was the opinion of Sir *Edward Coke* upon the ſtatute. 3 *Inſt.* 153.

One of his learned brethren was diſpoſed to think, that theſe caſes of reſignation bonds have reſolved that they are not ſimoniacal within the ſtatute of *Elizabeth*. He begged leave to obſerve, that ſuch a queſtion never could ariſe in any of theſe caſes, becauſe the ſtatute of *Elizabeth* never could be applied to avoid a bond, but in the preciſe caſe in which it would alſo avoid the preſentation; that is, in the preciſe caſe of that bond being made the *price* of the preſentation; becauſe it is in that caſe only the ſtatute of *Elizabeth* operates upon it. He thought he may venture to ſay there is not one of the caſes extant upon the ſubject of reſignation bonds in which it it ſtated preciſely, ſo that the court could conſider it as the point in judgment, that that bond was given for or by reaſon of or as the price of the preſentation; without

which circumſtance it was utterly impoſſible that the operation of the ſtatute of *Elizabeth* ever could have fallen under the conſideration of the court in diſcuſſing the merits of thoſe bonds.

It would have been perfectly extra-judicial to have pronounced in ſuch caſes upon the effect of circumſtances which did not exiſt in the caſe; and if to any other purpoſe theſe bonds are ſaid to be or not ſimoniacal within the ſtatute of *Elizabeth*, he confeſſed it was not to him intelligible, and certainly not appoſite to the point, in order to prove that the caſes upon reſignation bonds may be conſidered as having judicially been decided upon the conſtruction of that ſtatute. No caſe that he has ſeen profeſſes to have proceeded upon the ground of that ſtatute. No caſe has thoſe facts and circumſtances introduced into it upon which alone the queſtion upon the operation of the ſtatute could ariſe, and he doubted whether the ſtatute which does not profeſs to avoid the contract can avoid it by a general operation of law upon ſecurities ſuppoſed to be entred into againſt it.

What is it in truth that thoſe caſes upon reſignation bonds have decided? What have they decided directly or by any fair and reaſonable inference from what has been ſaid?—It is ſimply this, that it is *poſſible* that a reſignation bond, if nothing appears to be particularly ſtated to the contrary, *may* have been entred into for a *good* cauſe.

Three cauſes are ſuggeſted, namely, to provide for a patron's ſon, to ſecure reſidence, and to guard againſt calamities. They have decided in no caſe in which it appeared that the patron had bargained for a bond. All the caſes have ariſen (the caſe of *Heſketh* and *Gray* only excepted, which does not come up to the point in queſtion) upon the face of the condition itſelf.

He was very ready to admit, that it was extremely probable that in every one of thoſe caſes upon reſignation bonds, in truth and in fact, there was a bargain for the bond, and that it was, as between the patron and obligor of that bond, the *price* of his preſentation; but it could not poſſibly be intended by the court upon the caſe which appeared before them; which caſe ariſe ſingly upon the *oyer* of the condition of the bond; ſo much as the condition of the bond did expreſsly aſſert as the fact, ſo much the court would act upon; but as to any *intendment* beyond *that* which the condition ſtated, when the judges look out ſo anxiouſly for *poſſibilities* in order to ſupport

theſe

theſe bonds, he need not ſay to their lordſhips they were not likely to *intend* any thing, if it did not appear that in truth there was a bargain by which the bond was to be the price of the preſentation.

The caſe of *Jones* and *Lawrence* (*ſee page* 15.) certainly comes extremely near to the point, at large, and he thought it was the neareſt caſe that could be found. The condition of the obligation there recited, that the obligee procured the preſentation from the queen, and was to preſent *Lawrence*, pretending, when his own ſon ſhould be capable, to procure another preſentation for him: Therefore the condition of the bond went on to ſay, if *Lawrence* ſhould reſign, the bond ſhould be void. Now here is no expreſs ſtipulation; it is not ſtated, that it was for giving ſuch a bond as this that *Lawrence* was preſented; it fails in that point, which is the very point upon which this whole queſtion turns.

The parſon, who wiſhed to object to this bond, was obliged to take the caſe as it ſtood upon the condition ſtated upon the *oyer*, and he had not the advantage of any argument which could have ariſen from the being able to aſcertain, that for that preſentation a contract was entred into, and therefore the bond might be voluntary; and as it did not concluſively appear that it was otherwiſe, the judges would not intend that it was otherwiſe, and ſuch objections only could be taken as were conſiſtent with its being a voluntary bond, not extorted, and not given as the *price* of the preſentation.

Theſe bonds are ſo pregnant with political miſchief, that it has been with great difficulty, and not entirely to the ſatisfaction either of the lawyers or moraliſts, that they have been hitherto ſuſtained by putting a few *poſſible* caſes in which they *might* be ſuſtained: Determinations upon ſuch bonds were not made in the preciſe caſe of a reſignation bond extorted by the patron, as the *price* of his preſentation. Determinations in caſes wherein lawful motives *may* be ſuggeſted for requiring ſuch bonds, and for accepting them, will by no means apply to the caſe of a direct ſtipulation, even if this were an action of debt upon a bond.

In no view of this caſe has he been able to bring theſe authorities to bear upon the preſent queſtion, upon this ſtatute: In the arguments at the bar, he looked with anxiety for the application of thoſe caſes to the bonds in queſtion, from an earneſt deſire to conform to the prevailing opinions on this ſubject; opinions to which no man was expoſed to error more than he was, and he has

revolved

revolved this ſubject again and again in his mind; he has read the caſes over and over, and he converſed upon them, but he was at that moment unable to diſcover that the queſtion upon this *firſt* plea is concluded, or is even touched by any of thoſe caſes.

They appeared to him caſes decided upon a different ſubject, upon a different ſtate of facts, and upon grounds and principles of law, which, if they were well eſtabliſhed and applied to theſe caſes, had no relation whatſoever to the preſent caſe.

Laying them therefore out of the caſe, the general and particular queſtions included in it, are by no means complicated or entangled; the ſtatute of *Elizabeth* was made to enforce a very clear rule in the eccleſiaſtical law, that preſentations ought to be *ſpontaneous*.

To enforce this rule in a moſt emphatical manner, the ſtatute has uſed words moſt extenſive in their ſignifications, which are the drag-net that muſt of neceſſity take in every thing that falls in its way; the words are, "If "any perſon for any ſum of money, reward, gift, profit, "or benefit." (*ſee page* 4.) theſe are not technical words; whether in fact money, gift, reward, profit, or benefit has been received is a queſtion, which when reſolved muſt inſtantly be reſolved in the ſucceeding queſtion, whether the preſentation made in conſequence of it be or not within the ſtatute; there is the word *corruptly* added, but as applied to this ſubject, every preſentation which is not *gratituous* is corrupt. It is in no other ſenſe that the word *corrupt* is uſed.

The queſtion propoſed by their lordſhips would therefore depend, in his apprehenſion, upon the ſimple propoſition of the fact: Is the poſſeſſion of a reſignation bond, profit or benefit to a patron?

If he agrees to accept it for his preſentation, is it not alſo his reward for that preſentation?

If he exacts it or accepts it for his preſentation; is that preſentation *ſpontaneous* and *gratuitous?* which goes to the very marrow and ſubſtance of this ſtatute.

It appeared to him to be a thing extremely difficult to have a doubt upon this queſtion; in point of benefit, in every article in reſpect of which the patronage is valuable, it is marketable, and inſtantly becomes more valuable and more marketable.

That a patron only wiſhed to indulge his caprice by turning out a man, becauſe he did not like his face, or had a better motive, that he wiſhed to have an opportunity of preferring a more worthy man, he could confide in: Theſe are caſes that are not, he believed, within the

ſalvo of relief in courts of equity; and yet who ſhall ſay that this power is not valuable? Even ſuch a power being not ſubject to the controul of a court of equity is valuable to theſe who have it: The opportunity of providing for a ſon or any other particular object of bounty or affection; an opportunity of enforcing reſidence or preventing a clerk from holding pluralities: If a patron wiſhes to have ſuch opportunity, it is a benefit to him to have it, if he can have them upon any other terms than by means of making a bargain for his preſentation, it is all well; ſo far does the nature of this bond go, conſidered as a mere contract to reſign, but what ſhall we ſay to the money ſide of this obligation?

The obligor will certainly go the length to pay the penalty, if he chooſes to keep the living; this is a benefit beyond all poſſibility of doubt; is the chance that the obligor, who *may*, *will* ſo elect, worth nothing to the obligee? And why is not this chance to be eſtimated, which is excellently well adapted to this ſpecies of bargaining; it goes far beyond the idea of a mere aſſurance; for it is expreſſed in the condition; it is perfectly optional in the obligor whether he will reſign or pay the money, and it is not in the power of the obligee to compel him in all events to reſign; ſo that he muſt have this option in his contemplation at the moment he exacts this bond; he muſt know he leaves it to the option of another, and he muſt know that that option, exerciſed one way, puts a round ſum of money into his pocket.

If the concurrence of the ordinary were neceſſary to give the reſignation effect, then it becomes a bargain for a ſum of money upon a contigency which neither party can controul. In one word, he that ſtipulates for a reſignation bond, bargains for a ſum of money, or for that which to him is as valuable, and perhaps more valuable than that ſum of money. Either of them is beneficial to him; both of them therefore equally forbidden by the ſtatute. This was the opinion he had formed upon the beſt conſideration he could give the queſtion upon the effect of the ſtatute. He ſhould feel more uncomfortable than he did, knowing that he oppoſed the opinions of learned and able men upon this ſubject, if this reſted upon his mere ſpeculation; but this is by no means the caſe; it is an old opinion; the very caſe is put in a book, which it is ſaid is not of much authority: He was not extremely anxious to enquire whether it was by great authority or not, with reſpect to other caſes, becauſe it has evident marks of authority in this particular caſe, and ſuch as ought to entitle it to great conſideration.

tion. He alluded to the caſe in *Noy* 22 of Sir *John Paſcal* againſt *Clark*. The words are, It was, *&c.* (*See page* 16).

This caſe with the difference of formality that belongs to pleadings and the ſtate of a fact in evidence, is the preciſe caſe which ſtands upon this record It is ſaid to to be but a looſe note. It has theſe marks of authenticity about it; it gives the name of the caſe; it refers to the roll amongſt the records in the court of *Common Pleas* where that caſe is to be found; that caſe has been ſearched for, and has been found correſponding with the roll, as it is given in the book. It was a caſe in which ſuch an opinion *might* have been given; for it was a caſe in *quare impedit*, where and where only it ſeemed to him the effect of the ſtatute of *Elizabeth* upon preſentations could properly come in queſtion: It was a caſe in which the object of the plea was to eſtabliſh Simony; it was to eſtabliſh that a preſentation was void by reaſon of Simony. See this record in the appendix. 3

He was apprehenſive he might not be able to make himſelf perfectly intelligible to ſuch of their lordſhips as were not converſant with the forms of proceeding, in reſpect to what he was then going to ſtate; ſome of their lordſhips, he was confident, would underſtand him.

The fact was, the defendant in that caſe pleaded, that the church became void by the Simony of the parſon preſented, and that that Smony conſiſted in his having given a ſum of money for his preſentation. Having ſtated this in his plea, the defendant then went on to deny (in the language of the law, to *traverſe*) a part of the title which was ſtated by the plaintiff in his declaration. That part was, that the church became void by the death of the laſt incumbent. The point to maintain was, that it did not become void by the death of the laſt incumbent, but it became void by the Simony of that incumbent, operating upon that preſentation, and avoiding it in his life time; upon which the right of the queen to preſent did immediately attach.

It is plain that the matter of this plea, if he could have proved his fact, would have gone to have eſtabliſhed his part of the iſſue upon that traverſe; becauſe, if he could have ſhewn that in truth a ſum of money had been given, it would have proved that the church did not become void by the death of the incumbent, but by the ſimoniacal preſentation. This is ſaid to have paſſed at the trial; he did not give that fact in evidence, that the preſentation became void by the money, which was the language of his

his plea, but he gave another fact in evidence, (if this report has any credit in it) which was, that it was giving, not money, but a bond for the preſentation. The giving a bond for the preſentation, if the law of the land was, that that would avoid the preſentation, was juſt as effectual to be given in evidence to ſupport *his* ſide of the iſſue, as his proving that the money was given; and he begged leave to ſay, he was not bound to prove the money given; he was at liberty to prove the preſentation ſimonaical in any other reſpect that would avoid it; becauſe all that plea was mere matter of introduction, which the law requires; but the ſolemnity of the law requires a man ſhould not be at liberty to controvert parts of the title of the plaintiff, without ſtating ſome kind of title in himſelf; which when he has done, he may traverſe at his pleaſure any particular fact in the plaintiff's declaration.

He did traverſe a fact, which happened by accident to have a degree of connexion with the ſubſtance of his plea. That was by accident; he might have traverſed as well a fact, which had no connexion with the plea whatſoever; he was not bound to ſupport the plea: he might have abandoned it altogether, and go upon any other fact which would prove his iſſue. From this caſe it appears that he did ſo; not being able to prove money having paſſed, he reſorted to another matter, to ſhew the preſentation was ſimonaical, namely, that a bond of reſignation was given for it; and chief juſtice *Hobart*, a very able man in his day, and three other judges (if this was, as he preſumed it, a trial at bar upon this iſſue) were then of opinion, that the patron preſenting under an obligation, that the preſentee ſhould reſign when he would, upon three months warning, was Simony; and in truth, the queen's preſentee remained in poſſeſſion of the benefice; he therefore ſupported his ſide of the iſſue, and was ſucceſsful.

That is ſuch a confirmation of the truth and credit of this report as is not to be thrown away, by any obſervation upon the particular credit that might be due upon caſes leſs authenticated to the particular reporter. He who aſſerts, that the poſſeſſion of ſuch a bond is not a benefit within this ſtatute, ought to define the words of the ſtatute, and ought to aſſign the reaſon for narrowing their import. That an advowſon is, by the law of *England*, properly a patrimonial intereſt, aſſignable, valuable, and ſaleable, he was very ready to admit; let it be remembered then, that it is property which is valuable, aſſignable,

aſſignable, and ſaleable. What are the circumſtances that will affect this property, and will make it more valuable? When a bond of reſignation upon this property comes to be a point that preſſes, let us not endeavour to ſhift our ground becauſe it preſſes.

The only clauſe of the act of parliament from which an argument was ſuggeſted, by one of his learned brethren, in the courſe of the diſcuſſions upon this ſubject, is the 8th ſection of the ſtatute, which provides, that no man is to exchange a living for a benefit; and then, in the largeſt ſenſe of the word benefit, it might be ſaid, that he who takes a better living in exchange for a worſe, takes a benefit. That it cannot be a benefit within the ſtatute is impoſſible; if it was, there never would be any exchange. He has thought again and again upon that clauſe. He agreed that benefit there muſt mean ſomething in addition to the value of the thing exchanged. It means the ſame as it means in the firſt clauſe, ſomething in addition to that ſatisfaction which an honourable patron derives from the conſciouſneſs of having preſented a proper man, and having provided for a man who ought to be provided for. Reſpecting exchanges, neither can be conſidered in the conſideration of law, as either better or worſe; for they are, in the eſtimation of thoſe that make them, properly equal, however other men may differ upon it.

A living in the air of *Berkſhire* may be reckoned an equivalent for the difference of an incumbency in the hundreds of *Eſſex*. That is a fair argument. Each man throws into his ſcale circumſtances which eſtabliſh a perfect equilibrium in caſes of exchange between parties. In a caſe where there is not a ſingle ſhilling paſſing, if there is any other extrinſic benefit whatſoever, to the ſmalleſt amount, it is made a part in the conſideration of ſuch exchange:—There is no queſtion upon this act of parliament, ſuch exchange will be void.

There was a caſe cited by one of the learned judges, of a penſion upon a reſignation (*ſee page* 77.); a little conſideration will ſhew that caſe cannot apply. That was a caſe before the ſtatute, and perhaps it was *then* lawful to create penſions upon reſignations; but the act of *Eliz.* was intended to regulate that practice, and any caſe *before* the ſtatute will not apply to any argument drawn from it, to affect the conſtruction of the ſtatute.

Why ſhould the judges wiſh to narrow the operation of this remedial law? Without reſorting to the canons

or writings of the eccleſiaſtics, without travelling to *Rome* or *Geneva*, for notions of Simony, we may find in our books, that the traffic for diſpoſitions of vacant benefices is ſcandalous and odious; this ſtatute was made to prevent it; the form of theſe bonds facilitate to a very great degree that buying and ſelling of benefices, which biſhop *Gibſon* ſays they were introduced for the purpoſe of effecting.

The legal hiſtory of thoſe bonds ſhews how generally they have been uſed for that purpoſe. The caſe of *Hoſketh* and *Gray* is rightly determined, when the public avowed object of it was to ſell the preſentation upon a vacancy; it was a plain violation of the law and of decorum.

Mr. juſtice *Powel*, who ſupported theſe bonds, ſaid, that the common uſe of them was to have the money, and he declared his opinion to be, that if the judges had foreſeen the miſchief of them when firſt they held them good, they would have been of another opinion. (*See page* 19.)

Their lordſhips were now called upon to lay down a rule of conſtruction upon this ſtatute, which muſt have a very important effect upon theſe bonds; a fair opportunity preſented itſelf for checking a very growing evil.

Their lordſhips, he ſaid, called upon the judges for their advice and opinions upon the ſubject, and he held it was the duty of the judges ſo to expound the ſtatute as to advance the remedy provided by it. The judges ſhould advance that remedy, by adhering to the plain meaning of the moſt plain unequivocal words in the *Engliſh* language. If a bond of reſignation, given to the patron, be not a benefit to him, he was unable to gueſs what ſhould be a benefit to him. If preſenting to a benefice, upon ſuch a bond, does not avoid ſuch a preſentation, it ſeemed to him, that a moſt wholeſome law became a dead letter.

From what he had taken the liberty to ſubmit to their lordſhips, his anſwer to ſix of the firſt ſeven queſtions would be unneceſſary to give more at large; he ſhould only ſtate, that he was of opinion, upon the firſt queſtion, that an agreement made, *&c.* (*See page* 71.)

In anſwer to the ſecond queſtion, that if, *&c.* (*See page* 71.)

To the third queſtion. (*See page* 71.)

To the fourth queſtion. (*See page* 71.)

To the ſixth queſtion, that a bond given by an incumbent, on a benefice with cure of ſouls, to the patron thereof,

thereof, in the ſum of 3000l. defeaſible only by ſuch act as ſtated in the fifth queſtion, to be done by the ordinary (aſſuming for the preſent, that the ordinary is not obliged to accept the reſignation) is a bond for the benefit of the ſaid patron, in reſpect to the contingency, which ſuch incumbent cannot controul.

To the ſeventh. (*See page* 72.)

Upon the ſecond plea three other queſtions remained to be conſidered. He agreed that the excuſe ſtated by the right reverend prelate in this plea is not ſufficient in law. The matter of the plea is there pleaded as the ſentence of an eccleſiaſtical judge, and as ſuch, it is not ſtating any ſpecific ground of unfitneſs, by which their lordſhips could judge of the undue influence, power, and controul, which is the only vice in this plea imputed to the bond; it is wholly indeterminate; and he held the unfitneſs of the clerk of the defendant in error in the ſecond plea is not alledged with ſufficient certainty, and the plea is not ſufficient in law to bar the defendant in error from maintaining his action, and the unfitneſs of the plea in the manner ſet forth is not traverſable.

He forbore to enlarge upon theſe queſtions, becauſe it being ſo neceſſary for him to have the ſupport, and having it, of all his learned brethren, upon the effect of this plea, he was ſure he ought not to think of taking up any more of their lordſhips' time after having treſpaſſed ſo much upon their patience.

Mr. juſtice *Nares* ſaid he roſe to give ſimply his anſwer to the ſeveral queſtions that have been propoſed to the judges, and to ſubmit his reaſons to their lordſhips; but in ſo doing he would not be underſtood, in giving his reaſons, to be endeavouring to follow his learned brother (baron *Eyre*) from whoſe opinion he happened in ſome degree to differ, or to endeavour to anſwer every article he has gone through; but he ſhould ſubmit the parts, as he had reduced them into writing, and in that method in which they appeared to him they would be underſtood in the beſt and cleareſt light.

The firſt queſtion is, whether, *&c.* (*See page* 68.)

This queſtion ariſes upon the conſtruction of the ſtat. of the 31ſt Queen *Elizabeth*, which was made expreſsly for avoiding Simony and corrupt preſentations: The words by which perſons are prohibited to take are, "For money," *&c.* (*See page* 4.) from whence it is plain, that the word *corrupt* is the word which relates to *every* word before ſpecified: money, reward, gift, profit, be-

nefit, &c. therefore the queſtion is, Whether this bond is corrupt, or within the intent and meaning of the ſtatute?

To determine this queſtion, it was not neceſſary for him to ſhew how far Simony was or was not an offence at common law, but he could not help ſaying, notwithſtanding the caſe that has been mentioned out of *Moore*, (*ſee page* 14.) he ſhould think it was an offence at common law, becauſe it is ſo expreſsly determined in *Croke Charles* 361, (*ſee page* 4.) in which that caſe in *Moore* is totally contradicted. But the queſtion is, Whether this is a corrupt agreement by this ſtatute? which is certainly a common law queſtion; and indeed, Sir *Simon Degge*, ſpeaking of the canons before the ſtatute, ſays, that ſeveral of them were never put in execution, though intended to make ſuch contracts for the payment of money void. He ſays the canon of *Othobon* was of as little effect as the other, as to making the contract void, which was only determinable at common law. Then, why does this ſtatute provide againſt money, reward, gift, profit, or benefit ariſing to the patron for or in reſpect of ſuch preſentation? By this he underſtood, it was either money in groſs to be paid, annuities to be granted, either to the patron or ſome other perſon; either a total or partial exemption from tithes, or other profits belonging to the living, not the reſtitution of the living itſelf; they were matters collateral to it, or ariſing immediately out of the profits of that living.

He ſaid it was laid down in all our law books, and as early as the 24th of *Edw.* 3d, that preſentations are in the eye of the law of no ſort of benefit whatever. The patron therefore may preſent, becauſe he cannot have any profit; or, to take the words of an old book, which ſays, a preſentation is no profit to the patron, but only a preheminence; for the parſon has the profits, and if the patron takes them it is Simony. (*See page* 2.) And that is tranſcribed into the 3d *Inſtitutes*, 156. He ſays, that no intereſt or profit can be made of it.——He ſhould endeavour to explain the word *benefit*, in the firſt clauſe of the ſtatute, by ſome words uſed in another part of the ſtatute, which his brother who ſpoke laſt has alluded to. *That*, he apprehended, was the trueſt rule of conſtruction; of every deed or ſtatute you are to take the words fairly, one with another, and from thence form that ſort of conſtruction to make both intelligible. In the 8th ſection it is ſaid, if any, &c. (*See page* 6.) A caſe had been put,

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and he owned it ſtruck him: Suppoſe, that a living was exchanged that was double the value of another; *that* is certainly a benefit accruing to the other incumbent; now can it be conceived that this is a corrupt benefit within the ſtatute; but this benefit, it is manifeſt, is not mentioned in that part of the ſtatute. What reaſon is there for ſaying there is a benefit ariſing to the patron from having the living itſelf returned? To this purpoſe it is to be conſidered as none; beſides, the practice of giving theſe bonds appears to have prevailed *before* the ſtatute.

The ſecond queſtion is, whether, &c. (*See page* 69.)

He conſidered this together with the ſeventh queſtion, which ſeems to depend upon the ſame reaſon, there being no other difference than, that the ſecond queſtion mentions ſuch agreement, and the ſeventh mentions ſuch bond.

He was of opinion, that neither the agreement nor bond entred into for ſuch purpoſe as ſtated in this caſe, would make the preſentation void.

It may perhaps be exceeding difficult to point out the reaſons upon which general bonds of reſignation were originally held good. Many reaſons may be ſuggeſted; amongſt the reſt he mentioned that ſuch a bond was never conſidered in a criminal point of view, where particular people, as the ſons or relations, or particular friends were intended to be promoted upon a reſignation, he would ſuppoſe that the patron, at the time he gave his living to the incumbent had a great number of children, one perhaps he intended to bring up to the church. They were of that age at that time, he could not tell which it may be that may live to be old enough, or if he lived, how far his capacity may enable him to take upon him that ſacred function; and there may be other things to prevent it; and therefore it is impoſſible to ſpecify which particular child it ſhould be aſſigned to. If he has in his eye a relation amongſt others, he cannot perhaps point out that particular relation. Another thing, he could not tell in what part of his life he may by his behaviour offend or act *contra bonos mores*; or there may be other incidents; the incumbent might go and leave his church for too long a time, therefore reſignation bonds may be conſidered as having ſome little foundation at the time they were originally entred into.

But that ſuch bonds have been held good, appears from a regular train of caſes in law and equity for near two

fate. He was confident no preſentation was ever made where the bonds were not the conſideration of the preſentation; for if they were given *before*, it certainly muſt have been ſo, and if given *after*, it muſt have been in conſequence of ſome promiſe *before* the preſentation, or at leaſt in contemplation of the parties; and the ſubſequent execution of the bond ſhews *quo animo*, the intention, and upon what terms the parties preſented and the clerk accepted: *res ipſa loquitur*.

To ſhew there was no ſuch diſtinction in law or equity, he would only mention two caſes, though many more might be found upon examination upon record. The firſt is the record of *Heſketh* and *Gray*, which he had examined, and if ever a bond appeared to be in conſideration of the preſentation, it does in that caſe. It ſet forth upon the record a corrupt communication, and it is ſtated fully upon the record, what the agreement was, and it was *before* the preſentation. Then comes the preſentation itſelf; and that in purſuance of that agreement the preſentation was made; and the record ſet forth, that afterwards upon the ſame day, in purſuance and completion of the corrupt agreement, the bond was executed; that bond was determined to be good in law. He then mentioned a caſe in 2 *Chancery Reports*, 398, *Durſtan* v. *Sands* (*ſee page* 18.); where the bond was held good. For theſe reaſons, to the 1ſt, 2d, 4th, 6th and 7th queſtions he gave his opinion in the negative.

As to the 11th queſtion, whether, *&c.* (*ſee page* 69.) he thought the excuſe not ſufficient.

The 3d queſtion is, whether, *&c.* (*ſee page* 69.) He could not think this was a benefit within the intention of the ſtatute: Certainly no parſon will give a bond in a greater ſum than the value of the living, but with a determination to reſign that living according to the bond; but if this penalty is ſtated merely as the reaſon to enforce the reſignation, he apprehended the patron, if the incumbent refuſes to reſign, would be very far from having a benefit; becauſe he took it for granted, and ſo this is conſidered, that he would rather have the bond, or agreement, or covenant, be it what it will, ſpecifically performed, than have recourſe to the money; for the living itſelf, to anſwer the particular purpoſes for which he receives it, may be of much greater benefit to his family than the ſum of money, if paid as a penalty, and which he could never deſire to have recourſe

to, but when he failed of the ſpecific performance of the bond; he took it, *that* was not ſuch a benefit as would avoid the bond.

As to the 5th queſtion, he begged leave to decline giving any anſwer to it.

With reſpect to the 8th queſtion, whether the unfitneſs, *&c.* (*ſee page* 69.) he agreed with all the judges, it was not. Simony, like all other crimes, ought to be particularly pointed out, and ſhewn to the court by facts that conſtitute that offence; they muſt be ſet out in ſuch a manner as they can be denied, or elſe it is impoſſible there can be a trial upon them, and therefore he thought it was not ſufficiently ſet forth.

As to the 9th queſtion, whether, *&c.* (*ſee page* 69.) he gave the ſame anſwer to that, which all his brethren had done, namely, that it was not.

As to the 10th queſtion, whether the unfitneſs in the 2d plea ſet forth be traverſable, he was of opinion it was not; becauſe the unfitneſs alledged is only by way of inference or concluſion, and the principle of pleading, is, that no inference can be traverſed: it is ſo laid down in 11th *Coke*.

As to the 12th queſtion, whether, *&c.* (*ſee page* 69.) he had already given his opinion at large upon the other parts of the caſe; he ſubmitted to their lordſhips, it was unneceſſary for him to give any further anſwer to that queſtion.

Mr. juſtice *Willes* obſerved, that, as he had already heard the opinions of all his brethren in the anſwers that were given by them to the queſtions propoſed by their lordſhips, he ſhould endeavour to be ſhort, and refer to the arguments cited by them, as what he had to ſay has been ſo much better ſaid by them; but he wiſhed to anſwer thoſe queſtions as nearly as he could.

As to the firſt queſtion, he anſwered, admitting ſuch agreement to be a benefit to the patron, it did not follow, that ſuch benefit is within the act 31ſt *Eliz. c.* 6. *ſec.* 5.

To bring it within that ſtatute, he apprehended the agreement muſt be *corrupt*; the ſame ſtatute ſpeaks of it as a corrupt cauſe or conſideration; if an agreement be made uſe of to corrupt purpoſes, the benefit ariſing therefrom is ſimoniacal, and the contract void: Otherwiſe it is a pure and innocent contract: One of his brethren mentioned

tioned a clauſe in the ſtatute in ſection 8, with reſpect to a living, where it is ſaid, if any incumbent &c. (*ſee page* 6.) he never heard theſe exchanges were looked upon to be ſimoniacal, or within the meaning of this clauſe; and yet the clergiman is benefited by the exchange; but the benefit muſt be tainted with ſome ſpecies of turpitude, to make it corrupt or ſimoniacal. He knew no other way of finding out the meaning of the legiſlature than by conſtruing one clauſe by another, and the 8th clauſe is explained by the 5th. He owned the air of *Berkſhire* is more ſalubrious than the hundreds of *Eſſex*, (*ſee page* 97.) but that would be but a poor ſatisfaction for a poor clergyman to give up a living for one much leſs valuable than his own.

Suppoſe a man preſents a clerk to a living, and takes a bond from him with a ſpecial condition to reſign in favour of his ſon when he comes of age to take holy orders. From this bond the patron acquires a benefit, he acquires the means of providing for one of his children, to the eaſe of himſelf and the reſt of his family; yet this benefit is never conſidered within the meaning of the ſtatute to avoid the preſentation, nor has the bond been held upon that account void, as it would be by conſidering the ſtatute as a prohibition of all ſuch bonds. Lord *Holt*, in the caſe of *Bartlet* and *Viner*, lays down as clear law, that &c. (*ſee page* 19.) for theſe reaſons, he thought they were not a benefit within the meaning of the ſtatute, and therefore the preſentation upon ſuch a bond, is not void.

This brought him to the 3d queſtion; the anſwer to which depended in a great meaſure upon the reaſons that he had given in anſwer to the former queſtion: If a bond is made uſe of to ſecure the reſignation at requeſt, it is not to ſecure a *corrupt* benefit to the patron: Suppoſe a bond for a leſs ſum than the value of the preſentation, and it ſhould be merely for the purpoſe of getting the money, and not to procure the reſignation; this will be conſidered as taking a bond for a corrupt benefit to the patron, and the bond would be void; this would be a groſs abuſe of the bond, and no more nor leſs than a direct ſale of it for pecuniary and ſimoniacal conſiderations, and where the intention of the obligor and obligee appears to be ſuch, they have always been held void; therefore he conſidered this as not a bond to ſecure a benefit to a patron unleſs an improper uſe had been made of it.

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As to the fifth queſtion, he deſired their lordſhips' indulgence not to anſwer it, for the reaſons given by both his brethren; it is a new and an undecided caſe: though ſomething was ſaid of the marchioneſs of *Rockingham*'s caſe reſpecting it; *(ſee page* 46.) but he meant to give no opinion upon the ſubject.

He begged leave to ſubmit to their lordſhips one poſſible caſe. By the law of *Ireland* no perſon there can have any biſhoprick until he has reſigned all his preferments. If the ordinary refuſed his reſignation, would not the patron be compellable to withdraw hia preſentation?

As to the ſixth queſtion, *(ſee page* 69.) Suppoſe the biſhop was not compellable to accept the reſignation (which he by no means admitted) the bond was good, according to the doctrine laid down by the court in *Heſketh* and *Gray*, and the obligor is bound to ſee it performed.

If the ordinary refuſe the acceptance of the reſignation, he ſhould rather think, it was upon ſome corrupt purpoſe, which he had diſcovered, that would vitiate the whole; therefore, he gave his negative to the ſixth and ſeventh queſtions.

To the 8th queſtion: There is no ſpecification of undue influence in the plea; it does not contain ſufficient certainty; therefore, he would not travel at large through the caſes. There is *Specot*'s caſe, in 5th *Coke*. The biſhop is the moſt proper judge of hereſy and ſchiſm.

He cited a caſe from the year book of *Hen.* 8. where a plea was held too general, and no certain iſſue could be taken upon it; and the caſe of the biſhop of *Exeter* and *Hele*, in *Shower's Parliamentary Caſes*, 88, *(ſee page* 48.) where the plea was, the clerk was *minus ſufficiens in literatura*; that plea was allowed; the reaſon aſſigned ſeems to be, as it reſpected the ſufficiency of literature, it was a matter entirely ſpiritual, and not temporal. Nothing can be more uncertain than the plea of undue influence againſt a common law contract, without ſetting out what it was that was avowed to be the point to cauſe that undue influence: According to the *Articuli Cleri*, that muſt be a *reaſonable cauſe*, which muſt be ſpecially aſſigned, for *cauſa vaga & incerta non eſt rationabilis.*

As to the ninth, tenth, and eleventh queſtions, for the reaſons before mentioned, he apprehended the plea was no bar to maintaining the action, and the unfitneſs

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of the plea therein ſet forth is not traverſable, and the excuſe alledged upon the record for not admitting, inſtituting, and inducting the clerk, is not ſufficient in law.

This brought him to the ſolution of the ſecond, fourth, and twelfth queſtions, which contain the two great points; firſt, Whether the bond is good and valid in law? Secondly, Whether the preſentation made in conſequence of it, is not void?

As to the firſt point, the bond; ſuch general bonds of reſignation have been ſupported by authorities from the act of the 31ſt *Eliz.* down to the preſent time; therefore, he ſhould content himſelf with ſaying, ſuch bonds of reſignation are good. He paſſed over the caſe in *Noy*, (*ſee page* 16.) his brother that ſpoke laſt has given a moſt correct note of that, which ſhews it could not be any thing more than an *obiter dictum* of lord *Hobart*, or ſome of the others. Beſides, in the two laſt caſes of *Peele* and the counteſs of *Carliſle*, in *Strange* 227, (*ſee page* 22.) and in *Heſketh* and *Grey*, (*ſee page* 22.) the court would not ſuffer the validity of thoſe bonds to be argued: moreover, advowſons are a ſpecies of real property continually bought and ſold for money, the law allows they ſhould; if they were to be overturned, and general bonds of reſignation were in all caſes to be declared void, thoſe would become leſs valuable in the hands of the purchaſer. For thoſe reaſons which had been given by his brethren, he was of opinion the preſentations upon ſuch bonds are not void. He always had a leaning againſt bonds of reſignation: No man was a greater enemy than himſelf to them, when any improper uſe was made of them. Reſignation bonds have been compared to marriage brokage bonds; nothing can be more diſſimilar. It is allowed bonds of reſignation may be made uſe of, whereas marriage brokage bonds are againſt the laws both human and divine: and a corrupt agreement by undue influence to join perſons in matrimony, who are in every reſpect unfit for one another, is void. *Shower's Parliamentary Caſes* 76. (*See page* 25.) The ſame law holds with reſpect to bonds for part of a lady's fortune; they are fraudulent. It was argued at the bar, whether a bond of reſignation given by a judge to reſign, be good. If given to any body, it muſt be to the king; it would be bad, as it would be contrary to the act of K. *Wil.* which ſays that the appointment of judges ſhall be *quam diu ſe bene geſſerint.* The reſignation of a biſhop is impracticable

practicable upon two accounts: His conſecration and the ſeat he holds in this houſe. In ſhort thoſe appointments are the ſame as the land-marks of the nation; they muſt be ſupported: But theſe general bonds of reſignation have been always ſupported by the unanimous voice of the courts below. He concurred with his brethen, and he may ſay they all concurred, in conſidering theſe bonds of reſignation as good.

This brought him to the laſt head of argument; if the bonds are good, whether the preſentation will be void. It has been ſaid, this is a new caſe, and although the bond may be good, the preſentation may be corrupt and void in law, as being made in conſideration of entring into that bond. The caſes make no diſtinction, whether the bond is given *before* or *after* preſentation, as appears by the preſentation in the caſe of *Babington* and *Wood*, (*ſee page* 16,) and in *Durſton* and *Sands*, (*ſee page* 18.) and *Heſkith* and *Gray*, (*ſee page* 22.) in the latter caſe the pleadings were in ſubſtance, though not in preciſe terms, the ſame as in the preſent caſe. One of the pleas is in the ſame words, as the 2d plea is here. It is ſaid this comes on upon a *quare impedit*, and not in an action; he could not put the biſhop in a better ſituation than the obligor of the bond. The ſame law that binds the one muſt bind the other. The biſhop has not in his plea ſuggeſted any canon or eccleſiaſtical law upon which he juſtifies his refuſal: If the agreement is corrupt, he may refuſe; but if it is not corrupt, he could not think the refuſal of the clerk is right; and what ſhould bind the obligor of the bond ſhould alſo bind the biſhop, if that ſhould be good or bad.

He ſhould only beg a few minutes longer to make an obſervation upon the word *Simony*. He ſearched in the books and did not find any preciſe definition of it. He ſaw nothing in this agreement appearing upon the pleadings that is corrupt; therefore he was of opinion the preſentation in conſideration thereof is not ſimoniacal and void, and that was his anſwer to the 2d and 4th queſtions propoſed by their lordſhips.

Mr. juſtice *Gould* ſaid, that in ſubmitting his anſwers to their lordſhips, he ſhould take into conſideration the two laſt queſtions, firſt.

He then ſtated the *firſt* plea, and ſaid, he was of opinion, the bond was good and valid, and not corrupt and void in law. The ſecond plea ſtates, &c. (*See page* 69.)

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What ſentiments he *might* have entertained in this caſe was of very little importance then; and though his opinion *before* any determination had been given upon theſe bonds might have been different, yet, in that caſe, he ſhould have had great difficulty to have condemned them. He thought it would be againſt the ſpirit of the common law to *preſume* any thing bad, which *can* bear a different conſtruction, and where it *can* be applied to good purpoſes, to preſume it intended for bad. That is the amiable temper of the law of this country; but however that may be, if the caſe was *new*, however ſtrong an inclination he might feel for it, he had no right to indulge that wiſh. The long ſtring of determinations of ſuch bonds being good is the ſettled rule of law, and can only, in his opinion, be changed by the legiſlature; but that courts are bound by it, and not at liberty to depart from it. Courts of law are to take the law, and deliver it as they find it in the books: They cannot be at liberty to depart from them; and it would be attended with extreme danger to the community, and a ſource of the utmoſt confuſion and injuſtice, if they did.

Caſe of White and White, which, ſee in the Appendix.

Upon this principle, a cauſe was determined in this houſe laſt ſeſſion upon a writ of error from Ireland. He would moſt gladly have given his opinion in affirmance of that rule which was contended for, but the contrary was become a law. Though the mind of a judge may revolt at it, he muſt ſubmit to what is the ſettled law of the country. By the law of the land, he meant the general cuſtom of the kingdom common to all, which is formed of the known and repeated determinations of courts of juſtice, that create that rule for their ſucceſſors, and which the latter have no right to depart from. The people have an intereſt in them, and the courts of judicature are, as he may expreſs it, truſtees to preſerve them invariable for their benefit.

This opinion in the preſent inſtance was controverted, and the note of a book was quoted for it, of one *Noy*: The words are "It was ſaid by the court, *&c.*" *See page* 16.

This caſe has already been cited very accurately by one of his learned brethren; but upon inſpecting the roll, it appears, that the vacancy, as alleged by the plaintiff in his declaration, happened by the death of one whom he preſented. The defendant was preſented by the king;

the plea was, there was a corrupt agreement againſt the ſtat. of *Elizabeth*. He (Mr. juſtice *Gould*) then ſtated the plea from the roll. The plea was denied, which is called *traverſed*, in law, and it was inſiſted the vacancy happened before the death of the late incumbent, and upon that the iſſue was joined. It ſeems extraordinary to ſuppoſe, that upon this pleading any other corruption than that mentioned in the plea could be given in evidence. He knew it to be the opinion of perſons eminent in the ſcience of pleading that it could not be given in evidence; becauſe if you ſtate one thing, that is, that it is a void preſentation, becauſe a ſum of money was paid, and when you come to the trial ſhould be admitted to give in proof a general bond of reſignation, it would be conſidered as a trap and ſnare, and to ſurprize the plaintiff.

In a book called the Complete Incumbent, publiſhed under the name of *Watſon*; but, as he underſtood, a very able lawyer was the compiler of it, Mr. *Penn* the recorder of *York*, notice is taken of this note from *Noy*, that the record had been inſpected, and did not agree with that note. That in ſubſtance is ſaid by *Watſon*. Then the fair argument was, that the incumbent who was dead had given a ſum of money; it was therefore void by the ſtatute; it was downright Simony in the very teeth of the act of parliament. He was never parſon properly, land therefore the avoidance did not happen by his death; therefore upon this paſſage it was merely, as has been already ſaid to their lordſhips by his brethren, an *obiter dictum* upon which no ſtreſs could be laid.

In the caſe of *Babington* and *Wood*, (*ſee page* 16.) which had been ſo often mentioned to their lordſhips, there was no doubt, but that was a general bond of reſignation without any kind of recital whatſoever, otherwiſe than upon the agreement. That likewiſe paſſed in judgment in the *King's Bench*, and was afterwards unanimouſly confirmed by the eight other judges. In the caſe of *Jones* and *Lawrence* in the 8th king *James*, (*ſee page* 15.) it appears upon the record itſelf, that the condition of the bond is not againſt law, for a man may bind himſelf to reſign for good and valuable reaſons without any colour of Simony; but *Paſchal* and *Clerk* was ſo unfortunate as not to have the leaſt notice taken in it of that which happened ſeven or eight or ten years ſubſequent

ſequent to it; and he thought that no weight could be laid upon that paſſage in *Noy*.

With reſpect to the ſubſequent reſolutions their lordſhips had heard at the bar, what a multitude of them there has been. It is ſaid in 2d *Keble* 446. that theſe bonds had been adjudged good above a dozen times (*ſee page* 17.) he had a manuſcript which contains a report of the ſame caſe where the expreſſion uſed by the court is: It has oftentimes been reſolved that theſe bonds were good. That is not all; but Mr. juſtice *Blincow* in 12 *Mod*, ſays, he had heard from *Twiſden*, that they had been held good twelve times, which correſponds with the expreſſion in *Keble*. It was conſidered to be ſo firmly ſettled that it was not permitted to be argued again, but conſidered like diſputing firſt principles, which were ſo ſettled they ought not to be queſtioned. From all which he concluded, that the bond was good and valid, and not corrupt and void in law.

To the 11th queſtion, whether, *&c.* (*ſee page* 69.) he anſwered in the negative: the bond itſelf is not void. He relied upon the opinions already cited to their lordſhips, and as to the allegation that it is corrupt, ſimoniacal, and againſt law, that the preſentee ſhould give a bond, he held the allegation to be perfectly immaterial, as it does not mention and ſet forth the facts, by which it appears that it is void. Lord *Coke* in 2d inſtitutes ſays, it muſt be plainly ſet forth in a plea upon a *quare impedit*, and he tells us how the plaintiff may diſpute it and put it in the courſe of trial. It is not enough to ſay it is ſo, but it muſt be ſhewn how it is ſo. It is objected, that it was a price, the conſideration of the preſentation; and herein he differed from all the numerous caſes that have been adduced. It has been ſaid thoſe caſes have all been upon the ſimple ſtate of the condition itſelf entred upon record, and the demurrer made to it. There might ariſe trials upon iſſues, ſuch as controverting the requeſt, or the offer of the reſignation, and therefore it has in form never been ſet forth that the bond was made uſe of as a conſideration of the preſentation. One man executes, and another accepts a deed, *that* is the motive and conſideration to the tranſaction; therefore the expreſſion of the conſideration in direct terms ſeems to make no kind of diverſity: The rule of law *is expreſſio eorum quæ tacitè inſunt nihil operatur.*

If the tranſaction itſelf imports the motive and conſideration, it is preciſely the ſame thing as if alledged in direct

direct words: But if there had been corruption at bottom, it might in the case of such a condition be averred. We are told this in the case of *Jones* and *Lawrence*, (*see page* 15.) The book says it was alleged, that it was for corruption and Simony the bond was given, and therefore against law; but as this case is, there does not appear any cause for adjudging it Simony. He took this to be sound law, and that which was known at that time, and long before, as settled law; and he believed it now was pretty universally understood in *Westminster-hall* to be perfectly necessary to shew a corrupt condition in order to make it void. This condition standing in the way it does, and the presumpton being in its favour, the averment might be made explanatory of the true intent of the condition. For these reasons he held it, that there was nothing material to excuse the refusal shewn by this plea.

As to the 2d plea, it does not in terms express it to be corrupt or simoniacal; it says it was an undue power or controul, an undue influence, &c. (*See page* 55.)

In the case of *Jones* and *Lawrence* a second benefice is mentioned. These pluralities are indulged; a patron that has a living to present a parson to, would wish the clergyman had a good character, and would wish him to reside in the parish, that the profits of the living might be spent within the parish to support his parishioners and in works of charity. Another thing is mentioned in that book, to prevent non-residence and to check improper conduct. He might add one more reason that occurred to him, namely, to prevent an avoidance by cession; because we all perfectly well know that promotion is made a benefit to the bishoprick where the presentation goes out of the family, and belongs to the crown.

It is said if the incumbent is guilty of any irregularity he may be restrained by process from the ordinary. It may call for a more speedy redress than the form of those proceedings will usually allow. He should be glad to know why otherwise did the parliament interpose by penalties to compel residence, but under certain terms, to restrain pluralities; nor does even that act of parliament require so strict a residence as a pious and well intentioned patron may expect. He should pursue this no further, but to observe, that this plea says, it was to put the clerk under an undue influence, and it does not shew in what respect it does so; it is insinuating a suspicion which is not capable of being tried by any rule of law; it may

be for laudable purpoſes, when the contrary is not ſhewn.

Therefore he concluded that no ſufficient excuſe is ſhewn for the refuſal by the 2d plea.

He then came to the particular queſtions: In regard to the firſt, it is proper to obſerve the ſtatute is formed ſo as to comprehend preſentations, inſtitutions and exchanges. (*ſee page* 4, 5, 6.) It is made entirely againſt Simony and corruption: It is a miſtake that has crept into the books, that there is not a word againſt Simony in the act of parliament. It is plainly miſtaken by an improper or irregular printing, or elſe thoſe who firſt ſaid ſo have not given themſelves the trouble to look five lines above the 5th ſection; for the preamble upon which the preſent queſtion depends, inſtead of being placed at the head of that ſection, is placed at the cloſe of the 4th ſection, which 4th ſection includes the plan laid down in the new election of ſcholars to colleges, and that ſection deſcribes the mode by which penalties impoſed concerning colleges ſhould be recovered. Then the printer has miſplaced the preamble of the 5th ſection. Now it is clear from the words, it is for the avoiding Simony and corruption in the preſentation of a benefice, and the inſtitution and induction to the ſame. Then we come to the enacting part, That if any perſon, *&c.* (*See page* 4.)

Thoſe are the words that relate to and tye up the enacting part of the ſtatute to the preamble of the act, to ſhew the word *benefit* only put in as a general word to include every *poſſible* intereſt.

In anſwer therefore to the firſt queſtion; ſuppoſe an undertaking given by the incumbent to the patron for his reſignation; yet being ſo without more, it muſt be taken to be a *fair and innocent benefit*, which may anſwer *good* purpoſes, and in this view only it is to be taken to be a benefit, which is not ſimoniacal or corrupt.

He might obſerve to their lordſhips, that the act of parliament ſeemed to him to be a well digeſted plan at that time by the legiſlature, to collect together, by a great deal of ſtudy, all the material cauſes of Simony; and firſt they provide for colleges, next for churches of all kinds, preſentations, gifts and donations, and after they have done that, they come to clergymens' obtaining orders by corruption; and it approaches at leaſt to the true meaning of Simony; if it is corrupt in the one, it is corrupt in the other. It has been already obſerved, that

that the preſumption muſt be taken the other way, and the neceſſary conſequence in anſwer to the 1ſt queſtion is, that the agreement not being void by the ſtatute, the preſentation for or by reaſon of it will not be void by law; which is alſo an anſwer to the 2d queſtion.

In anſwer to the 3d queſtion, the benefit derived to the patron is not condemned by the ſtatute. If the agreement be allowable, the bond to ſecure the performance of it muſt be ſo too; and whether the penalty be greater or leſs than the value of the incumbency, it did not in his opinion make any difference: It is no more than conjecture, that if the penalty was leſs, the incumbent would pay it rather than reſign: It is not for us to impute ſuch turpitude in ſuch contract, unleſs ſhewn to be ſo intended. Therefore he conceived that ſuch a bond, whether ſuch a penalty be more or leſs than the value of the living, (unleſs the contrary be ſhewn) can only be taken to be an *innocent* benefit.

The 4th queſtion muſt depend upon the third; therefore the preſentation for or by reaſon of any ſuch bond will not be void; becauſe, if admitted to be a benefit, it is an *innocent benefit*.

As to the 5th queſtion, his brethren had, as he conceived, very properly deſired their lordſhips to excuſe an anſwer. One of his learned brethren had given an anſwer, a very able one, that made a great impreſſion upon his mind: It was impoſſible for him, till he had heard a queſtion of ſuch importance thoroughly argued, to venture to give a judgment upon it.

Upon the 6th and 7th queſtions he ſhould ſay no more than that he agreed with the determination of *Heſketh* and *Grey* (*ſee page* 22.); whether you can get the biſhop to accept the reſignation or not, you have undertaken to do it. The law ſays you muſt make a complete reſignation. It is not complete unleſs the biſhop will accept it: if he does not prevail upon him to accept it, then he has forfeited the bond.

The next queſtion is, whether the unfitneſs of the clerk of the defendant in error in the 2d plea mertioned be alleged with ſufficient certainty? All his brethren were of opinion in the negative, and he moſt heartily concurred with them.

As to the 9th and 10th queſtions, they were anſwered in what he had already ſubmitted to their lordſhips, and it was impoſſible to anſwer them any otherwiſe than that the plea is not ſufficient to bar this action.

As to the argument of inconvenience, it is forcible in law; and certainly their lordſhips, after ſuch a ſeries of determinations, would conſider the great conſequence that would attend the reverſing ſuch a judgment, and overſetting what in his humble apprehenſion was clear law. It was impoſſible for their lordſhips to divine what number of livings in this country may ſtand under this predicament, and it would avoid them all, and throw the next preſentation into the hands of the crown. It would ſubject the patron and incumbent to the penalty of two years income, to the utmoſt extended value of the living: When it is to be preſumed, as he ſuppoſed upon the faith of theſe authorities, they thought they were innocently contracting for ſuch a bond of reſignation.

Lord chief baron *Skinner* ſaid, that as the greater number of the queſtions which their lordſhips had been pleaſed to propoſe for the conſideration of the judges ſeemed to him to depend upon the ſame principles and authorities of law, it would be neceſſary to enquire into the grounds and reaſons upon which thoſe authorities have been determined, in order to ſee how far they apply to, and in what manner and degree they influence, the determination of the preſent caſe.

The caſes already decided take it for granted, that a contract or bond to reſign a living was not ſimoniacal or corrupt, if it was made or given for a proper purpoſe. Such contracts the canon law allowed. He was authorized in ſaying the canon law allowed ſuch contracts; becauſe he found that biſhop *Stillingfleet*, an able oppoſer of bonds of reſignation, and to whom he referred rather than to the canon law, in a tract he publiſhed under the title of a letter to the archbiſhop of *Canterbury*, and which was written upon mature conſideration, and after his well known diſcourſe concerning bonds of reſignation, written in an anſwer to ſome obſervations which the biſhop of *Saliſbury*, then biſhop *Burnet*, had made to it, admits, that the generality of the rule of the canon law, which their lordſhips had heard repeated, muſt be taken with ſome limitation; and he adds that the *pactio honeſta* was admitted by it. He mentions a contract to do or compel that which was required *de jure communi*, or *de jure ſpeciali*, as for the incumbent to reſide at his church; and he refers to the obſervations he made in his former tracts on the bonds taken by the biſhop of *Saliſbury* of his prebendaries to force them to reſide within the dioceſe, which no law or ſtatute required, inſtead of taking

taking bonds to make them reſide at their cathedral church, which the ſtatutes of that church required.

Taking it for granted, that all contracts were not unlawful, and that a bond for a proper purpoſe *might* be given, the judges conceived that a *general* bond of reſignation, which being in itſelf indifferent might be applied either for a good or a bad purpoſe, ought to be judged of according to the intent with which it was given, or the uſe to which it was applied. In putting this conſtruction upon general bonds of reſignation, they adopted the rule of conſtruction which the learned judge who ſpoke laſt alluded to, and which the humanity and the juſtice of the common law puts upon all acts which are in themſelves indifferent; if they are capable of being applied to different purpoſes good or bad, legal or illegal, the preſumption of law is always in favour of the good or legal purpoſe, unleſs the bad and illegal purpoſe be proved.

And this rule of conſtruction holds ſtill more ſtrongly in all caſes in which the act, if it is illegal, ſubjects the parties to it to pecuniary penalties, perſonal diſabilities, or forfeiture of temporal rights; all which accrue in the caſe of a ſimoniacal preſentation.

This was the ground upon which thoſe determinations proceeded; whether they were founded upon true policy or not, was not his preſent purpoſe to enquire; but at the ſame time, and in conſideration of theſe determinations, it muſt be allowed, that all of them, from the caſe of *Jones* and *Lawrence* (*ſee page* 15.) down to the preſent time, have been in caſes between the parties to thoſe bonds, and upon queſtions concerning the validity of ſuch bonds as between thoſe parties; and that no determination has been in a caſe like the preſent between the patron preſenting and the biſhop refuſing to admit the clerk preſented; and where a bond is intended to be given for the preſentation.

This made it neceſſary to enquire what had been the extent and effect of the former determinations, and what is the intent and meaning of the ſtatute of *Elizabeth*, in order to ſee how far former deciſions agreed with the preſent caſe, and the queſtions their lordſhips had been pleaſed to propoſe.

It has been determined, that a bond to reſign upon requeſt of the patron given by the incumbent, previous to and in contemplation of the preſentation, is not void, ſimo-

niacal, or corrupt, as in the caſes of *Jones* and *Lawrence*, (*ſee page* 15.) and *Babington* and *Wood*, (*ſee page* 16.)

The courts of common law were competent *before* the ſtatute upon ſuch a queſtion to decide, whether it was Simony or not, as being a lawful or unlawful act, tho' not to puniſh it. The caſe of *Macallor* and *Todderick* in *Cro. Car.* 361, (*ſee page* 4.) in three different parts of the book, 337, 353, and 361, at three different times, and in Sir *William Jones* 341, underwent great and long conſideration: The court held Simony was an offence whereof the common law took notice *before* the ſtatute of *Elizabeth*. They founded their judgment upon this principle, namely, if no ſimoniacal or corrupt purpoſe *appears* upon ſuch a bond, none ſhould be preſumed; but if it was made with ſuch intent, it may be averred in the pleadings.

This is to be collected from the caſe of *Jones* and *Lawrence*, and *Babington* and *Wood*; (*ſee pages* 15, 16.) and tho' the contrary was held in *Oldbury* and *Gregory*, in the 40th year of *Elizabeth*, (*ſee page* 14.) referred to in the caſe of *Web* and *Hargrave*, (*ſee page* 41.) though for another purpoſe, he begged leave to repeat it for this reaſon: Three years afterward it was expreſsly laid down by the court, that the generality of the obligation made to reſign at requeſt may be averred to be for a *particular purpoſe*, and in the caſe of *Birt* and *Manning*, (*ſee page* 40.) in the 11th year of king *Charles* I. reported in *Cro. Car.* 425, the court in deciding upon a covenant to procure a preſentation, in conſideration of marriage; it was objected to as being ſimoniacal; but they ſaid without a ſpecial averment, or ſhewing it was a ſimoniacal contract, it ſhould not be ſo intended.

Lord *Holt* in *Carthew* 301, (*ſee page* 40.) aſſerts the ſame doctrine, and gives the reaſon for it: The obligor, ſays he, is admitted in the caſe of Simony to aver againſt the condition of a bond, or againſt the bond itſelf, for neceſſity's ſake; and he likewiſe in another part in the ſame book (*ſee page* 19.) lays down that law ſtated by one of the learned judges, who ſpoke early on the firſt day, namely, any contract made about any matter or thing which is unlawful by any ſtatute is a void contract, tho' the ſtatute itſelf does not mention it; for the penalty implies the prohibition. That is founded in ſound policy, and if the conſtruction contended for upon the part of the plaintiff in error be the true conſtruction of the ſtatute of *Elizabeth*, it ſhould ſeem that bonds in thoſe caſes which have been determined to be good, were void by the

ſtatute; for it was recited that the benefice was vacant, and the patron intended to preſent to it, the parſon giving the bond. Taking it then as admitted, that a general bond of reſignation is a benefit within the meaning of the ſtatute, the recital of the bond was evidence of ſuch agreement for ſuch a benefit, and in that caſe the bond was as clearly void, according to the doctrine of Lord *Holt*, by operation of the ſtatute, as the preſentation would be by the expreſs words of it. But it was not neceſſary to draw all the concluſions introduced by theſe determinations; it would be ſufficient for him to eſtabliſh theſe two propoſitions. That the bond was given by the incumbent to the patron, previous to and in contemplation of the preſentation, and ſo appearing in the bond itſelf, it is not a ſimoniacal or corrupt contract or agreement. And the 2d, that no ſimoniacal or corrupt intent or purpoſe appearing in the bond, none ſhould be preſumed.

Whether a ſimoniacal bond or contract is made void by the ſtatute, or whether Simony, as the law was then held, might have been averred in the pleading, would not be material for the purpoſe of his argument; it was ſufficient that in the preſent caſe, and as the law is now held, it may be averred: And therefore this being the caſe, their lordſhips would give him leave to conſider the ſtatute of *Elizabeth*. *Before* that ſtatute, which was made for puniſhing and reſtraining Simony, it was not taken as an offence at common law. The eccleſiaſtical law deprived the incumbent of the living; but it could not affect the temporal rights of any perſon for making a ſimoniacal contract, or ſubject him to any forfeiture or penalty.

The compilers of the *reformatio legum eccleſiaſticarum*, a work carried on under the authority, though it did not finally receive the ſanction, of parliament, would ſubject a ſimoniacal patron to the loſs of his preſentation for that turn. There is a chapter from which he would take their lordſhip's leave to cite as much as was neceſſary for the preſent purpoſe; it may ſerve as a ſpecimen of the elegant language in which thoſe laws were expreſſed. He cited it to ſhew the ſenſe which the learned compilers of that code, conſiſting of the moſt eminent prelates, divines, civilians and common lawyers, with archbiſhop *Cranmer* at their head, reputed to be the moſt eminent canoniſt in the kingdom, had of a ſimoniacal preſentation, to which they thought fit to annex the forfeiture of the patron's right. He cited the *Latin* words, and ſaid, that the premature death of *Edward* VI. and

the character and diſpoſition of his ſucceſſor, prevented thoſe laws from receiving, when finiſhed, the ſanction of parliament.

The right of a ſimoniacal patron to preſent another clerk upon deprivation of an incumbent, was not affected by them; but in the reign of queen *Elizabeth* it appeared, the idea of ſubjecting the temporal rights of the patron to forfeiture was revived and carried into execution by the ſtatute in queſtion.

The queſtion upon the ſtatute muſt be collected from what is profeſſed to be the object of it. It profeſſes in expreſs words, as was obſerved by the learned judge that ſpoke laſt before him, to be for the avoiding of Simony and corruption in preſentations, *&c.* and for that purpoſe it exacts, among other things, that if any perſon, *&c.* (*ſee page* 4.)

The introduction to and the concluſion of this clauſe ſhew what ſort of benefit was meant by it, namely, a benefit ariſing from a corrupt agreement, ſuch an agreement as in the words of the ſtatute conſtitute a corrupt cauſe or conſideration for giving or beſtowing a benefice. It was intended, in forming the ſtatute, to expreſs and ſpecify every ſort of ſimoniacal and corrupt preſentation; and leſt any might be omitted, the concluding words are added, any *ſuch corrupt cauſe or conſideration*, which explain the import of the former, and affix to them the meaning neceſſary to anſwer the purpoſe of the ſtatute, which is profeſſed to be to avoid Simony and corruption.

The enquiry then returns to the queſtion, what is a corrupt agreement?

And from thoſe concluſions and poſitions of law which he mentioned, and from what was decided in former determinations upon which that queſtion muſt be decided, their lordſhips would collect that ſuch a bond is not a corrupt agreement, and no bad purpoſe is to be preſumed. He ſaid, he muſt return to thoſe poſitions he wiſhed to determine it upon. For the ground and principle upon ſuch a queſtion muſt be the ſame, whether it ariſes upon a *quare impedit* between the patron and ordinary, refuſing to admit, or between the patron and crown claiming a forfeiture, or between the patron and incumbent, in an action upon the penalty of a bond, or between the parties in a contract in a ſuit for the penalties. If it was otherwiſe, every contract or bond, accompanying the preſentation, though made for gift, or given, and ſo expreſſed to be upon the pureſt motives, and to anſwer the beſt purpoſes,

poſes, would ſubject the patron to the forfeiture of the right of preſentation, and the incumbent to a penalty even for a *pactio honeſta*; ſuch a bond to compel reſidence by the rigid rule of the canoniſts was allowed, and it would induce forfeitures and penalties for ſuch a bond, as it tends to accelerate the patron's right of preſentation in the caſe of non-reſidence or diſobedience of the law; or the forfeiture of a bond would be ſo far beneficial to the patron, and there would be no difference between the *pactio honeſta* deſigned to anſwer good purpoſes, which the canon law allowed, and which biſhop *Stillingfleet*, the ableſt canoniſt in his age, admitted, and the *pactio inhoneſta*, though it was a benefit derived from that agreement. The ſtatute means to apply to the *pactio inhoneſta*: If a different conſtruction is put on this ſtatute, it will carry its proviſions further than the ſtatute itſelf propoſes to extend it, and further than the object of it requires; the ſtatute profeſſing its purpoſes to be for avoiding Simony and corruption in preſentations, *&c.* would be made to vacate preſentations which are not ſimoniacal, preſentations and benefices which were not given or beſtowed upon any corrupt cauſe or conſideration.

He was not aware that a general bond of reſignation was in terms forbid by the canon law, or at leaſt as that law was allowed and received in this kingdom, at the time of making the ſtatute of *Elizabeth*.

It is true, the oath of Simony enjoined in the time of archbiſhop *Courtney* was in expreſs terms directed againſt ſuch bonds; but there is, he believed, no trace in eccleſiaſtical hiſtory, that marketh out how long that form of the oath continued, or when it ceaſed to be uſed. He thought it probable it had been aboliſhed before the reformation; for had it continued in uſe to the 25th of *Henry* VIII. it would have been continued by the act that paſſed that year to the firſt year of *James* I. when new canons were made, and a different form of an oath enjoined. It is certain, either it was not in contemplation of, or it was rejected by, thoſe eminent perſons who had the charge of reforming our eccleſiaſtical laws in the reign of *Edward* VI. The oath, as propoſed to be enjoined by that act, makes no mention of agreements to reſign. The collected wiſdom of thoſe reformers thought it a ſufficient ſecurity againſt Simony, according to their notion of Simony, if the oath applied only to gifts or rewards, and to contracts for gifts or rewards: We know the ſimoniacal oath enjoined by the canons in

1603

1603 is directed in general terms againſt ſimoniacal contracts and purpoſes, without any mention or alluſion to contracts or agreements for reſignations.

Theſe were the grounds and reaſons upon which he formed his opinion, upon the queſtions put by their lordſhips, and upon conſideration of what was alluded to by the learned judge who ſpoke before him, that penal laws ought not to be extended beyond their natural import in a doubtful caſe. The penalties inflicted by this ſtatute are exceedingly ſevere, not only to the patron, who loſes his right of preſentation; but, if this is a caſe within the ſtatute, all the incumbents who have entred into ſuch bonds, muſt be made to ſuffer as well as the patron, and to pay double one year's profit of their living, which, it is determined, muſt be the *full* value thereof, and be incapacitated from holding thoſe livings any longer.

It is true, that compaſſion is not to obſtruct juſtice; but he could not be perſuaded to think from any thing he had heard at their lordſhip's bar, that the legiſlature, in paſſing this act, and in making uſe of ſuch terms and expreſſions uſed in it, intended to ſubject to ſuch extreme ſeverity of puniſhment, any perſon who ſhould be induced by a patron to do an act which the canon law of this country preſumes to be done with a good intention, and for good purpoſes. Theſe were the reaſons which induced him to give the following anſwers to the queſtions propoſed.

As to the firſt queſtion, (*ſee page* 68.) he was of opinion, that ſuch agreement is not an agreement for a benefit within the meaning of the ſtatute,

And in anſwer to the ſecond queſtion, (*ſee page* 69.) that ſuch preſentation made by reaſon of ſuch agreement, is not void in law.

To the third queſtion, Whether a bond, &c. (*ſee page* 69.) He conceived, the bond is not a bond for ſecuring a benefit to the patron within the meaning of the ſtatute.

And in anſwer to the fourth queſtion, (*ſee page* 69.) he was of opinion ſuch preſentation will not be void.

In regard to the fifth queſtion, which reſpects a ſubject of great importance and conſiderable difficulty, he was glad of availing himſelf of the indulgence their lordſhips were pleaſed to give the judges, to decline anſwering it.

With regard to the ſixth queſtion, (*ſee page* 69.) he was of opinion ſuch a bond as is mentioned in that queſtion,

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is not a bond for the benefit of the patron, within the meaning of the ſtatute.

And in anſwer to the ſeventh queſtion, depending upon it, ſuch preſentation will not be void.

His anſwer to the eighth queſtion, (*ſee page* 69.) was, that the unfitneſs of the defendant in error, in the ſecond plea, is not alleged with ſufficient certainty.

To the ninth queſtion, the anſwer was, the plea is not ſufficient in law to bar the defendant in error from maintaining his action.

To the tenth queſtion, (*ſee page* 69.) The unfitneſs in the plea ſet forth is not traverſable.

With reſpect to the eleventh queſtion, (*ſee page* 69.) the anſwer is founded upon the reaſons he had given in anſwer to the firſt queſtion, namely, that the excuſe alleged upon the record, for not inſtituting and inducting the clerk of the defendant in error, is not ſufficient in law.

And as to the twelfth queſtion, (*ſee page* 69.) he was of opinion, the bond ſtated in the plea was good and valid, and not corrupt and void in law.

Biſhop of *Saliſbury*:—My Lords, I never yet roſe in this Houſe without great diffidence; but never with ſo much reaſon as at preſent. A recent private affliction * has left me neither inclination nor leiſure to arrange my thoughts with the preciſion I could wiſh; nor to inveſtigate, with the accuracy which becomes me, the whole of the queſtion under you lordſhips' deliberation: A queſtion important in its conſequences to the parochial clergy of this country; eſſential to the reſpect due to the Church of *England*; and to the intereſts, and even to the decency of religion. Deeply impreſſed, my Lords, with theſe ſentiments, and feeling how unqualified I am, under the circumſtances ſtated to your lordſhips, to enter deeply into the buſineſs before you; I ſhould have remained ſilent, had the learned judges been unanimous in their anſwers to the queſtions propounded by your lordſhips. But the difference, not to ſay the contrariety, of their opinions, authorizes me to aſſume the liberty of exerciſing my own judgment, and of calling upon your lordſhips to exerciſe yours.

The whole of the queſtion to be decided, appears to me to reſt ultimately on the 31ſt of *Eliz.* The interpre-

* The death of Sir *William Guiſe*, Bart. brother-in-law to the biſhop of *Saliſbury*, to whom he was left executor.

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tation given to that ſtatute by the learned judge who diſſented from the reſt of his brethren, is conſonant to the beſt and moſt diſpaſſionate opinion I am capable of forming; and which therefore I hold myſelf bound to deliver to your lordſhips.

It is well known, my Lords, that the act to which I allude was paſſed with a view of protecting the eccleſiaſtical law, and of ſtrengthening its weakneſs. The eccleſiaſtical law, which conſiders Simony as a crime of deep dye, (and by Simony I beg to be underſtood to mean any corrupt agreement between a patron and a clerk, relative to the obtaining a benefice) could only puniſh the *clerical* offender: The legiſlature perceiving the ſerious conſequences of this defect, in its wiſdom interpoſed; and inflicted certain penalties on the patron; the corrupter, the tempter, and the partaker of the guilt.

The act of *Eliz.* is not deprivative, but accumulative. It does not deprive the eccleſiaſtical judge of his power. It does not withdraw the clerk from the juriſdiction of his ordinary, nor diſpenſe with the oath againſt Simony, to which every preſentee was previouſly ſubject. Its main object was to prevent corrupt influence, intereſted motives, and groſs abuſe of his power on the part of the patron; and to apply a remedy to an evil thought to be of the moſt dangerous frequency, of the moſt alarming magnitude at that day; which has been continually increaſing to the preſent period; and which, unleſs checked, bids fair to break down every barrier which honour, decency, and religion can oppoſe.

The queſtion on which your lordſhips are now to paſs judgment, I conceive to be new in ſpecie. It is here, my Lords, I mean to make my ſtand. None of the various caſes which have been adduced by the judges in the houſe, or by the council at the bar, ſeem to me to touch it.

They are diſtinct in their nature; the caſe has never been argued; never been decided upon; and conſequently all the reaſoning from a ſeries of determinations in the courts below, ſo much laboured and ſo much preſſed, does not apply, and falls to the ground.

Much has been ſaid, my Lords; much more probably will be ſaid, as to the inexpediency and fatal effects of moving old foundations. If I know myſelf, few men are leſs likely to err in this reſpect than I am. Legal deciſions, which for centuries have received the ſanction of ſucceſſive generations, of the great and able interpreters

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of law, who preſide in our courts, (and greater and abler either in former ages, or the preſent day, no nation ever had to boaſt of) are intitled to the higheſt reverence, from every citizen who reſpects his own character; values his property; or loves his country. But I contend, my Lords, that in the caſe before you there are no precedents: It is ſpecific in its circumſtances; and, excluſive of the bond, on the ſole ground of the 31ſt of *Eliz.* the preſentation of the defendant in error is void.

On this principle, my Lords, I think the plaintiff in error founded in his *firſt* plea.

As to his ſecond plea, I not only acquieſce, but perfectly concur in the unanimous opinions of the learned judges, that he is not founded.

Here, my Lords, I ſhould naturally cloſe what I have to offer to your lordſhips conſideration. But as the ſituation of the parochial clergy, on the foot of the commonly received interpretation of the law relative to general bonds of reſignation, is either unknown or miſunderſtood; I ſhould be wanting in juſtice to that moſt uſeful and moſt reſpectable body of men, were I not to repreſent it without exaggeration; and leave it to your lordſhips' honour and humanity.

Every preſentee, previous to his receiving inſtitution, is obliged to take the oath againſt Simony. The ſenſe of that oath is as clear as language can make it. There never could have been the heſitation of an inſtant at to its meaning, in the breaſt of any man, who, in interpreting the terms in which it is expreſſed, followed nothing but the genuine ſuggeſtions of his own underſtanding. The only queſtion which can ariſe on the ſubject is a queſtion of conſcience alone; but unhappily, the force of temptation in this, as in other inſtances of moral conduct, operates on minds not ſufficiently tender to the impreſſions of duty; and leads to the foſtering a ſecret wiſh, that the impoſition of the oath could either be diſpenſed with, or the terms in which it is framed be differently expounded from its obvious import. The ſurpriſe of an unexpected offer of a valuable benefice; the oppreſſion of poverty; the calls, perhaps, of a numerous unprovided family; and the glitter of comparative affluence, all contribute to induce to the liſtening to any caſuiſtry which can reconcile intereſt with duty. To a man thus circumſtanced, and thus inclined, authority is eaſily admitted in the place of reaſoning, and the ſanction of courts ſuperſedes conviction. From theſe motives, general bonds of reſignation have

have uſually been given; and from the inſtant they are given, the wretched preſentee is taken from under the protection of that law which guards the property of every other ſubject of the ſtate. He ceaſes to be free; becauſe he holds his living at the abſolute will of his patron; ſubject to his caprice; and rendred incapable of diſcharging many of the moſt eſſential duties of his office, where they happen to claſh with the prejudices, the humours, or the vices of the maſter of his fortune. Nay, my Lords, even the moſt degrading compliances, the ſacrifice of every comfort which unconditional preſentation confers, are inſufficient to ſecure a permanent continuance in the benefice, the inſtant that the wants, or even the whim, of the patron demand an avoidance: Reſignation or ruin is the alternative. Your lordſhips need not be told which is likely to be ſubmitted to.

On theſe grounds, I move your lordſhips, that the judgments of the courts of *Common Pleas* and *King's Bench*, in this cauſe be reverſed.

The Biſhop of *Bangor*:—My Lords, I never riſe in this Houſe without great diffidence; but I never had ſo much reaſon to diſtruſt myſelf, as on the preſent occaſion; ſince, notwithſtanding the weight and authority of the determination of two courts in *Weſtminſter-hall*; notwithſtanding what has been urged at the bar in behalf of the defendant in error; notwithſtanding what has fallen from moſt of the learned judges in confirmation of the judgment in the courts below, I am not yet ſatisfied, that the judgment was right, and entertain ſome hopes, that your lordſhips will be induced to make an alteration in it, after giving the matter that conſideration, which a queſtion of ſo much conſequence deſerves, and is ſure to meet with in this Houſe.

I had occaſion, my Lords, many years ago in the courſe of my inquiries, to conſider the ſubject of general bonds of reſignation of benefices; and I muſt confeſs, that the deciſions, one in the 8th of *James* I. *Jones* and *Lawrence*, and the other of *Babington* and *Wood*, in the 5th of *Charles* I. (*ſee page* 15, 16.) did not appear to me to reſt on ſuch ſolid and ſubſtantial grounds, as they ought to have done; and yet theſe two determinations are the precedents, which our courts have ever ſince implicitly followed, whenever the legality of ſuch bonds was brought into queſtion.

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Many canons were made in the early ages of the church, as well as in more modern times, in order to prevent the buying and ſelling of benefices; and numberleſs are the councils which have condemned this kind of traffic, as ſimoniacal; and from hence many good reaſons might be brought to ſhew the illegality of bonds of reſignation of benefices; but as ſome doubts would perhaps be made, whether ſuch canons and councils had ever been received, as part of the eccleſiaſtical law of this country; and as arguments of this ſort have not, I know not why, ſo much attention paid to them in theſe days as they really deſerve, I ſhall wave the conſideration of them entirely; and, inſtead of troubling your lordſhips with recitals from canons, councils, conſtitutions, *&c.* I will inquire what is to be found in our ſtatute-book concerning this ſubject; and the ſtatute which I ſhall have occaſion principally to advert to, is the 31ſt *Eliz. c.* 6. and from a careful peruſal of that ſtatute, I am inclined to think, that bonds of reſignation of benefices, whether the condition be ſpecial or general, are within the expreſs letter of it; becauſe it is impoſſible to conceive how a preſentee can, in any inſtance whatever, give a bond of reſignation to a patron, from which the patron will not derive ſome benefit or reward, *directly* or *indirectly*.

STATUTES on this ſubject, are the following, viz. 31 Eliz. c. 6. 1 Wm. 3. c. 16. 12 Anne, ſt. 2. c. 12. See page 4, 27, 37.

The words of the ſtatute (31 *Eliz. c.* 6. *ſect.* 5.) are theſe; *If any perſon*, &c. (*See page* 4.)

Should any clerk, therefore, before he receives the preſentation, give the patron a bond with a condition for the making of ſuch leaſe, the granting of ſuch a portion of tithes, *&c.* there can be no doubt, but that a bond with ſuch a condition would be ſimoniacal, and within the expreſs letter of this act: But, let it be ſuppoſed now, that, inſtead of ſuch a bond, one is given, the condition whereof is, that the clerk ſhall reſign upon the requeſt of the patron, or after a notice of ſix months, or the like. Is ſuch a bond within the ſtatute? We have been told by all the learned judges (except one) who have hitherto delivered their ſentiments, that ſuch a bond is not within the ſtatute; and yet certain it is, that even in this caſe, as it is now put, a valuable conſideration may be paid by the preſentee on one hand, and received by the patron on the other. If the clerk, when called upon, refuſes to reſign, he muſt pay the penal ſum mentioned in the bond; and if, in order to avoid that, he reſigns, the intereſt he thereby parts with, is exactly

exactly worth ſo much as the poſſeſſion of the benefice, for ſo many years as he might otherwiſe have held it, would have amounted to; and therefore, whatever the clerk parts with, juſt ſo much doth the patron gain. But here it will be ſaid, that the advantage, which a patron may happen to gain under theſe circumſtances, doth not amount to a profit, or benefit within the act, becauſe no money is *directly* paid, or received, or even covenanted to be paid. But, before we admit this concluſion, let it be recollected, that the words of the ſtatute are "*For any ſum of money, reward, gift, profit, or* "*benefit whatſoever directly or indirectly*"; and when therefore a bond is given to reſign a benefice, the poſſeſſion and reverſion whereof bear a price, and have a real value, which may be eſtimated, with the utmoſt exactneſs, can it be ſaid that no emolument of any kind whatever accrues to the patron either directly or indirectly? Certainly it cannot be ſo ſaid; and all ſuch bonds therefore muſt appear to any plain and common underſtanding, to be within the ſtrict letter of the act.

But if we ſhould, for the preſent, allow that general bonds of reſignation of benefices are not within the ſtrict letter of the ſtatute, will it be ſaid, that they are not within the ſpirit and deſign of it?

This act, as it is ſet forth in the 4th *ſection*, was expreſsly made for the avoiding of Simony, and corruption in preſentations, collations, *&c.* to benefices, dignities, *&c.* and yet, if theſe bonds are allowed to be legal, there is no ſimoniacal or corrupt bargain whatever, which may not, under this cover, be carried into execution. For, let us ſuppoſe that a patron preſents a clerk to a benefice, without receiving any *money, or bond, or any* aſſurance whatever for money; but before he executes the preſentation, he declares, that the preſentee muſt enter into a bond to reſign the benefice upon ſix months notice under a heavy penalty. The clerk ſubmits to all this in order to obtain the preſentation. He is preſented accordingly, and as ſoon as he is in full poſſeſſion, the patron demands a leaſe of a certain portion of tithes at an under-rent. The queſtion now is, whether ſuch a bond be within the deſign and intent of the ſtatute? If we peruſe the bond, we ſhall, I confeſs, find not one word about letting the tithes at this or that rent, as the condition of the bond is expreſſed in general terms; and the reaſon why it is ſo drawn up, is, becauſe,

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had ſuch a ſtipulation been mentioned, it would have been clearly and plainly againſt law. But, though this ſtipulation is left out of the bond; yet is not the penal ſum mentioned therein ſufficient to make the incumbent comply with the patron's demand? And if ſo, is not the intent and deſign of this act moſt effectually defeated, and ought not all ſuch general bonds to be ſet aſide, as clearly contrary to the ſpirit of it? Indeed the moſt pernicious method of defeating a law is a device which, without breaking the letter of the law, deſtroys the main intention and deſign of it; and general bonds of reſignation of benefices are, with reſpect to this act, a contrivance of that kind.

It will perhaps be but to little purpoſe to ſhew in a caſe like this, that general bonds of reſignation of benefices are within the ſpirit and deſign of the act, as we ſhall be told, that our courts of law are to judge according to the letter of the act, and not according to the equitable conſtruction of the intent and deſign of it. But would not this, my Lords, be a ſtrange limitation, which ties up a court to the letter of a law, againſt the main ſcope and principal end of it? As to myſelf, I can hardly believe, that our courts are or ever were tied up in this manner, and my reaſon for thinking ſo, reſts on no leſs authority than that great oracle of the law, Sir *Edward Coke*, —— His words are theſe: *Caſes out of the letter of a ſtatute, yet being within the ſame miſchief or cauſe of making the ſame, ſhall be within the ſame remedy that the ſtatute provideth.* If therefore general bonds of reſignation of benefices tend to bring on the very miſchief and inconvenience, which this act was made to prevent, the remedy provided by that act ought to be extended to them; and to ſay that the remedy cannot be applied, becauſe ſuch bonds are not within the letter of the law, though within the reaſon of it, is a very unſatisfactory anſwer. 1 Inſt. 24. b.

I remarked juſt now, that the worſt and moſt corrupt practices might be carried on under the cover of general bonds of reſignation of benefices; and I will in this place, with your lordſhips' permiſſion, point out ſome of the bad purpoſes, to which ſuch bonds may be applied.

By means of ſuch a bond a patron may erect a juriſdiction over his clerk much ſuperior to that of his ordinary.

The ordinary can ſuſpend a clerk from the exerciſe of his function, and can deprive him of his benefice; but before any one of theſe can be done: 1. The party

muſt be cited to appear: 2. A charge, commonly called a libel, muſt be given to him: 3. A competent time muſt be allowed for anſwering the charge: 4. A liberty muſt be granted for counſel to defend the cauſe, and to make exceptions to the proofs and witneſſes: And 5thly and laſtly, after hearing all the proofs and anſwers, a ſolemn ſentence muſt be pronounced, from which there lies an appeal. But a patron with ſuch a bond in his pocket has a much more compendious way of doing his buſineſs; for he can deprive his clerk without trial, without proof, without ſentence.

The privileges of patrons in this country are the three following, *viz.* A liberty of ſelling the rights of advowſons, of trial at common law, and of preſenting a fit clerk to the ordinary at any time within ſix months after an avoidance; and as ſoon as the patron has exerciſed this laſt privilege, he has nothing more to do. The relation between the preſentee and the ordinary commences by the inſtitution and induction, and from theſe two acts are derived all the rights of the incumbent; but, by means of ſuch a bond, the patron may carry his power beyond the preſentation, though the law of the land acknowledges no ſuch power.

By means of theſe bonds patrons can convert beneſices, which are all by law freeholds for life, into eſtates for years, for months, or even only for a few days.

By means of theſe bonds the revenues of that moſt uſeful and reſpectable body, the parochial clergy, are growing leſs and leſs every year; and there is little doubt, but that many of the money payments in lieu of tithes, and which have now obtained the form of a modus, ſprang originally from theſe bonds.

By means of ſuch a bond the miniſter of a pariſh is put into a ſituation very improper, and extremely unworthy of that character; ſince there is no ſpecies of compliance, to which his patron may not call upon him to ſubmit. He may be ordered to preach doctrines which are contrary to thoſe of the eſtabliſhed church, he may be preſſed to make the pulpit a vehicle for ſcandal, for politics, *&c.*—Candour indeed forbids us to think, that many will yield to ſuch unreaſonable propoſals, but the temptation is great. The incumbent muſt ſubmit, or ſtarve; he muſt gratify his patron, or loſe the maintenance of himſelf and family.

By means of theſe bonds it is become as eaſy to ſell the next avoidance of a rectory or vicarage, as it is to ſell

ſell any other ſpecies of property; and from this circumſtance, religion, learning, diſcipline, and good order ſuffer very much.

It has been common of late years to advertiſe in the publick prints the ſale of livings with immediate reſignations; but, if this judgment ſhould have the ſanction of this houſe, theſe advertiſers would wax bolder, and in a ſhort time inform us of public offices being opened for negotiating this ſort of traffic, and to the long liſt of brokers for every kind of merchandiſe, that of church brokers would ſoon be added.

Theſe, My Lords, are ſome of the evils, which general bonds of reſignation of benefices have a direct tendency to produce; and yet, great as theſe evils are, there ſeems, as things now ſtand, to be no mode of redreſſing them.

One of the learned counſel for the defendant in error told your lordſhips, that it is unfair to preſume, that an improper uſe will be made of theſe bonds, as nothing improper appears upon the face of them; and ſhould a wrong uſe be made of them, the courts are open, where redreſs will certainly be found.

To this it may be anſwered, if nothing, but what is juſt, and right, and honeſt, is intended, why is it not plainly expreſſed in the bond? Were this the caſe, all parties would be cleared from every imputation, and no room would be left for the ſuſpicion of any thing wrong or improper. And as to what is ſaid concerning our courts being open and ready to give redreſs in all caſes, where a bad uſe is made of theſe bonds: It muſt be confeſſed, that this appears very plauſible; but, when examined, it will be found to have very little meaning in it; becauſe the court can take no notice, unleſs ſome complaint is brought, and who in the preſent caſe is to lodge the complaint? Not the patron, as he muſt be the party accuſed, if any thing improper is attempted: And as to the incumbent, he will not have ſufficient ground for a ſuit, if the patron calls on him to reſign, and gives no reaſon for ſo doing. Indeed, if the patron ſhould give any reaſon, why he calls upon his clerk for a reſignation, that reaſon might be made the ſubject of diſcuſſion in ſome of our courts in *Weſtminſter-hall*; and if the court deemed it an improper one, the bond would be ſet aſide; but as long as the patron is ſo cautious as to give no particular reaſon, for requiring his clerk to reſign (whatever the true reaſon may be, how corrupt or ſimoniacal ſoever) ſtill there would be no room left for

lodging a complaint in any of our courts; and the clerk muſt either reſign, or pay the penalty mentioned in the bond. To ſay, therefore, in caſe an improper uſe is made of thoſe bonds, relief may be had in our courts, is ſaying juſt nothing at all, as no matter can be found, whereon to build a ſuit, as long as the patron is inſtructed to give no reaſon, why he calls on his clerk to reſign; and this being a ſmall point of law, which the meaneſt country attorney knows, it is not likely that any patron ſhould fall into a miſtake here; and it is in vain therefore to expect any relief in this way.

Fourth ſect. ſee page 4.

But, my Lords, if the ſtatute of the 31ſt of *Eliz.* ſo often adverted to, was, as it is ſet forth in the ſtatute itſelf, made on purpoſe to prevent all trafficking in eccleſiaſtical benefices; and if general bonds of reſignation appear to every common underſtanding to be within the letter of that act, inaſmuch as it is hard to conceive how a preſentee can give a bond of that kind, from whence the patron muſt not derive ſome advantage or other: This being the caſe, it is natural to aſk, how it came to paſs, that the courts in *Weſtminſter-hall* have ſo lately determined, that theſe general bonds are not within this ſtatute, eſpecially when we conſider further, that they are moſt undoubtedly within the ſpirit and deſign of it, becauſe the moſt wicked and fraudulent purpoſes may be carried on under their cover; and, what is much to be lamented, with the greateſt ſafety and ſecurity, as long as the patron aſſigns no reaſon, why he calls on the incumbent for a reſignation.

The ſhort anſwer is this: That the courts below were guided entirely by precedents, and particularly by the determinations in the caſes of *Jones, &c.* when general bonds of reſignation of benefices were firſt adjudged to be valid.

Folio edit. 3d vol. 713.

The learned biſhop of *Worceſter*, in his diſcourſe concerning bonds of reſignation, has examined with great freedom, the two deciſions of *Jones, &c.* and has not ſcrupled to call them judgments without ſufficient reaſon to ſupport them; and he was induced to form this opinion from the following conſideration, *viz.* That it was extraordinary, that the judges ſhould determine a bond to be good, which might be turned to ſo many ill purpoſes; as one part of the buſineſs of a court of juſtice was to diſcourage any device, that tended directly or indirectly to introduce the very miſchief, which the ſtatute of the 31ſt of *Eliz.* was made to prevent; and yet by means of this judgment, that ſtatute has been rendered uſeleſs.

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One of the learned judges, who inſtructed your lordſhips, a few days ago, with ſuperior ſkill and ability, proved in the courſe of his argument, that the point now under your conſideration was not the point in queſtion, when the two caſes were determined, on which ſo much ſtreſs was laid in the courts below, as well as by all, who have argued before this houſe for the validity of theſe bonds; and if ſo, theſe precedents, which have been hitherto ſo much relied on, are not at all to the purpoſe, and no regard ought to be paid to them; but the learned judge did not ſtop here, for he produced a caſe in point, the caſe of *Paſchall* and *Clerk* in the 15th of *James* I. when the court determined, that, *if the patron takes a bond of reſignation at three months warning, it was ſimoniacal within the ſtatute.* It has been uſual to paſs by this caſe as not authentic, but the learned judge went into this point alſo, and ſhewed it to be a genuine report of the famous attorney general, Mr. *Noy.*

This, my Lords, puts the matter in a new light. The caſes of *Jones*, &c. are ſhewn not to be applicable to the preſent ſubject, becauſe the point now under the conſideration of this houſe, was not the point in queſtion when theſe two caſes were determined; and beſides this, the caſe of *Paſchal* and *Clerk* is produced, wherein the point now before your lordſhips was the matter in queſtion, when that caſe was determined, and then the court adjudged general bonds of reſignation to be ſimoniacal within the ſtatute.

But ſuppoſing, my Lords, that the point now under conſideration was really the ſame, as was determined in thoſe two caſes of *Jones*, &c. yet there is a circumſtance attending the preſent caſe, which cannot but have great weight with this houſe. I mean, my Lords, the uniform declaration of all the judges, who have hitherto delivered their opinions on this occaſion; that if this caſe had been *res integra*, the judgment ought to have been different; but the weight of theſe two precedents of *Jones*, &c. and of many others for ſo great a length of time, preſſes ſo hard upon them, that they are unwilling to make any alteration, leſt they ſhould be conſidered as removing landmarks, and unſettling principles, which had prevailed for near two centuries.

Much reverence, my Lords, is certainly due to ſuch deciſions of our courts, as have been uniform, and long acquieſced in; but if, in ſucceeding times, great and manifold inconveniences ſhould be found to ariſe from perſiſt-

ting in ſuch determinations, and no inconvenience from altering them, the caſe is too plain for me to tell this houſe what ought to be done.

There are ſome deciſions on the books, which can hardly be reconciled with the common feelings of humanity; and I need go no farther back than laſt year for an example. The caſe I mean is *White* and *White*, which was brought by writ of error from *Ireland* to our court of *King's Bench*, and then by a writ of the like kind to this houſe, and the judgment was affirmed by your lordſhips, purely on the authority of precedents. Many of your lordſhips were, I well recollect, diſpoſed to reverſe the judgment; but on your being aſſured by two learned and noble lords, that the titles of the eſtates of half the great families in *England* and *Ireland* would have been ſhaken, if the judgment had been reverſed, you thought it expedient to affirm a judgment you did not approve of, leſt, by reverſing it, a door might have been opened to endleſs law-ſuits. [*See this caſe of* White *and* White *in the Appendix.*]

But the preſent caſe, my Lords, is not of that kind. It has been allowed by all the judges, that general bonds of reſignation may be abuſed; and it is notorious, that a moſt ſcandalous uſe is, at this time, made of them; and no body has pointed out any one inconvenience, that would ariſe from the reverſal of this judgment: But the great advantages, which would thereby inſtantly accrue to religion, learning, good order, and diſcipline, are ſo obvious, that it would be impertinent in me to lay them before your lordſhips *. One conſequence, however, which would follow from reverſing this judgment, ought not to be concealed, *viz.* That all the benefices, the preſentations to which were obtained by giving ſuch bonds, would become immediately vacant, and the patronage for this turn forfeited to the crown; but as many, we ought in candor to preſume, have given as well as taken theſe bonds, without any bad intention, it would be neceſſary to paſs a ſhort bill for quieting patrons and incumbents in the poſſeſſion of their rights; and I am not aware, that any ſolid objection can be made to ſuch a bill.

* See 31 Eliz. ch. 6. ſect 4. in page 4.

I will beg your lordſhips' patience, for a few minutes longer, whilſt I make a remark or two on what one of the learned judges ſaid, reſpecting the oath againſt Simony, as it ſtands in the 40th of the canons in 1603.

It was inſinuated, that as theſe deciſions in favour of the validity of general bonds of reſignation were made on an

act of parliament in the 31ſt of *Eliz.* a clergyman who had given a general bond of reſignation for obtaining a preſentation, might ſafely take an oath againſt Simony, which is required by a canon agreed upon in the ſucceeding reign.

In order to ſet this matter in a clear light, it will be proper to obſerve, that in very early times the oath againſt Simony was to this effect, *viz. That, for the obtaining the preſentation, he (the clerk) had neither promiſed, nor given any thing to him that preſented him,—nec aliquam propter hoc inierit pactionem,—nor entred into any covenant for that end, viz.* to obtain the inſtitution,—*propter hoc, i. e.* ſays *Lyndwood, ut preſentetur.* In the time of archbiſhop *Courtney* the form of the oath was more full, the following clauſe being added, *viz.* * That neither themſelves, nor any friends of theirs, are under any bonds about the reſignation or exchange of theſe benefices. Here the oath is expreſsly againſt all bonds of reſignation.

See Lyndwood fol. 109.

Anno 1381.

* See Regiſter at Lambeth. *Title* Morton. See alſo Biſhop Stillingfleet's anſwer to Biſhop Burnet, in Miſcellaneous Diſcourſes, page 40, 41.

In the form of the oath, which was afterwards made uſe of, there is no mention made of bonds, but the words are, *ſimoniacal payment, contract*, or *promiſe*; and as all payments, contracts, or promiſes, which are made for the purpoſe of obtaining a preſentation, were conſidered as ſimoniacal by the eccleſiaſtical law; and as the form of the oath, which is required by the canons of 1603, is word for word the ſame, as what was in uſe long before the act of the 31ſt of *Eliz.* we muſt not have recourſe to the deciſions in *Weſtminſter-hall* on points ſuppoſed to have ariſen out of that act, for the meaning of thoſe words *ſimoniacal payment, &c.* but we muſt inquire, what the ſenſe was, in which thoſe words were taken, when the oath, in that form, was firſt impoſed; and I need not tell your lordſhips, that they were interpreted in thoſe days in ſuch a manner, as to extend to every kind of bargain, promiſe, aſſurance, and the like, which could poſſibly be made in order to obtain a preſentation to a benefice.

Beſides all this, the ſtatute of the 31ſt of *Eliz.* makes no alteration in the eccleſiaſtical laws, but leaves them juſt as they were; and to thoſe laws therefore recourſe muſt be had, for the true meaning of the word *ſimoniacal payment, &c.* and not to the common, or ſtatute law.

See page 6. ſ. 9.

This being the caſe, my Lords, I will venture to ſay, that no clergyman of theſe days, who gives a bond of reſignation in order to obtain a preſentation to a benefice, can ſafely take the oath againſt Simony, as it ſtands in the canons of 1603.

I would not have your lordſhips imagine, that I preſume to lay down this doctrine on my own authority only; for I can produce the authority of two of the greateſt prelates ſince the Revolution, I might add, ſince the Reformation; and who, as they were converſant in all parts of uſeful learning, ſo did they particularly excel in the knowledge of our eccleſiaſtical laws.—The prelates I allude to are *Stillingfleet* and *Gibſon*.—The former, notwithſtanding what was ſaid by one of the learned judges, has declared himſelf againſt bonds of reſignation of all kinds, in divers parts of his voluminous writings; as well in thoſe which he publiſhed himſelf, as in thoſe which came out after his death; and, in one place he expreſsly calls ſuch bonds, ſnares to the conſciences of clergymen; * and this he ſays in alluſion to the oath againſt Simony, which, he adds, muſt be interpreted, not by any deciſion in *Weſtminſter-hall*, but by our own eccleſiaſtical laws, or by the texts of the canon-law.

* See Miſcellaneous Diſcourſes, page 57.——

As to the other authority, biſhop *Gibſon*, he has delivered the ſame opinion in more places than one, in his uſeful work the *Codex Juris Eccleſiaſtici*, &c. and I happen to be acquainted with the caſe of a preſentation to a vicarage in *Hertfordſhire*, to which this ſame biſhop refuſed to give inſtitution, becauſe a bond of reſignation had been given by the preſentee; though it was one of thoſe bonds, which are ſaid to be the leaſt exceptionable, if a bond of any ſort can be ſaid to be without exception.

I thought it my duty, my Lords. as a member of the bench to which I have the honour of belonging, to take notice of this circumſtance, leſt, if what fell from the learned judge had met with no contradiction from this part of the houſe, it might have been concluded, that in caſe your lordſhips ſhall not think fit to make any alteration in this judgment, a clerk who had given a bond to reſign, in order to obtain a preſentation, might ſafely take the oath againſt Simony.

Leſt ſo pernicious a doctrine as this ſhould get abroad, and the authority of a learned judge be quoted for it, I could not excuſe myſelf from making theſe remarks; and I cannot better conclude them than in the words of biſhop *Stillingfleet* himſelf.——*Therefore*, ſays he, *my requeſt is to all ſuch clergymen as are in danger of having ſuch bonds put upon them, that they would ſtudy the caſe, and ſatisfy their minds, before they venture upon taking an oath, which may afterwards rob them of that peace and tranquillity of mind, which*

See Stillingfleet's Works, fol. edit. 3d vol. page 740.

which every good man will eſteem above any benefice in the world.

I thank your lordſhips for this indulgence, and humbly move, that the judgment be reverſed, and that judgment be entered for the plaintiff in error.

The Biſhop of *Landaff* ſaid, that though he was extremely ſenſible how much it would become him, to endeavour to beſpeak the indulgence of the houſe, for the liberty he was then taking of delivering his ſentiments on a ſubject which had received ſo able and ſo ample a diſcuſſion from the learned judges, and from his brethren who had ſpoken before him, yet he held their lordſhip's time to be far too precious to be conſumed in liſtening to any preface or apology which he could make. He was the more emboldened to deliver his opinion on the ſubject, from obſerving that the judges themſelves were not agreed in theirs; had they been perfectly united in ſentiment, he ſhould have had much greater ſcruple and heſitation in ſpeaking than he then felt; yet even in that caſe, he could not have ſuffered himſelf to have remained altogether ſilent, on ſuch an occaſion, when a queſtion of the greateſt importance, both with reſpect to the intereſts of the eſtabliſhed church, and the general intereſts of the Chriſtian religion, was to receive the ſolemn and final adjudication of that houſe.

The importance of the queſtion, he obſerved, with reſpect to the eſtabliſhed church, was evident enough, from the effect which its deciſion might, eventually, have on its revenues; they might be very materially injured thereby. There was not, he was perſuaded, one of their lordſhips, who had duly weighed the cauſe and religious utility of an eſtabliſhed church, and made himſelf ſufficiently acquainted with the extent of the revenue appropriated to the ſupport of our own, that could ever entertain the moſt diſtant wiſh of ſeeing that revenue leſſened. The proportion indeed, he ſaid, in which that revenue was diſtributed amongſt the clergy might, in his ſincere opinion, eaſily admit an improvement conducive alike to the good of religion, and the welfare of the ſtate; but that of whatever ſentiments their lordſhips might be on that head, he was certain they would concur with him in thinking that the whole revenue, when taken in the groſs, was not more than ſufficient, if ſufficient, for the proper maintenance of the eſtabliſhed church; it could not, without danger to the civil community, admit of any diminution. But the legality of general bonds of reſignation, if their lord-

lordſhips ſhould adjudge them to be legal, would have a direct tendency to diminiſh that revenue in a great degree; for no ſooner would that legality be generally known, but pettifoggers of the law, money ſcriveners, land ſurveyors, and all the ſimoniacal jobbers of eccleſiaſtical property, would conſpire with needy patrons, and with more needy clerks, to invent and execute a thouſand colluſive plans to rob the church of a portion of that patrimony, which the pious wiſdom of their anceſtors had annexed to it, and which their piety, he truſted, and their wiſdom would never ſuffer to be diſſevered from it.

But the importance of the queſtion, he ſaid, might be conſidered in another and more momentous view, as it reſpected the purity of our holy religion. It was not for the ſecurity of the church revenue, that he was in any degree ſolicitous, except ſo far as that ſecurity tended to render the clergy more fitted to diſcharge with fidelity the high duties of their ſacred function. General bonds of reſignation put the miniſters, who ſubmitted to them, into a ſtate of dependence, awe and apprehenſion, inconſiſtent with their ſituations as preachers of the goſpel. The Pope, in former ages, was a great encourager of reſignations among the clergy of this kingdom, becauſe he obtained a year's income of the benefice upon every avoidance; but neither were the catholic clergy of this country at that time, nor are they, he believed, at this time, fettered by general bonds of reſignation. In the church of *Scotland*, he ſpoke, he ſaid, under the correction of many noble lords in that houſe, who certainly knew the matter much better than he did: But he believed he was right in ſaying that this unholy traffic in holy things had not yet polluted the minds of either the patrons or miniſters in the church of *Scotland*; nor was it practiſed in any proteſtant church in *Chriſtendom*, at leaſt not in the ſame degree in which it was practiſed in our own. This traffic, he ſaid, was a ſore ſcandal to the church of *England*; and he hoped, from the high ſenſe of religion and honour which had accompanied the deliberations of that houſe, that the time was now come when it would be no longer endured. Even in the primitive ages of the Chriſtian church, when it was not only unprotected by the civil power, but perſecuted by it; when kings, inſtead of being its nurſing fathers, were the bittereſt of its enemies; even then, when the clergy were maintained out of the eleemoſynary collections, which, by the direction of St. *Paul*, were made by every congregation of Chriſtians every Lord's

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day, a miniſter of the goſpel was not in ſo precarious, dependent, and every way improper a ſituation as the legality of general bonds of reſignation would place him in, becauſe his ſupport did not then depend upon the caprice of ſome one flagitious individual, who might be offended by the evangelical freedom of his diſcourſe, but upon the good ſenſe of hundreds of well-diſpoſed Chriſtians, who felt themſelves edified thereby. This, he ſaid, was a very ſerious conſideration, and much deſerving their lordſhips' attention; he did not wiſh, nor, he would take the liberty to ſay, was there a biſhop on the bench who wiſhed, to ſee the clergy rendered inſolent by an accumulation of wealth and power; but he muſt ever wiſh, and he was ſure he ſpoke the ſenſe of all his brethren, they muſt all of them ever wiſh to ſee the clergy rendered ſo independent of all men, that they need not be afraid to tell any man of his ſins; but that they might reprove, rebuke, exhort, and preach the word of God with ſincerity and truth, without ſhrinking from that part of their duty, from an apprehenſion of being turned out of their benefices if they diſcharged it. The alienation of the church revenue, and the introduction of a ſpurious, timid, temporizing Chriſtianity, were two great inconveniences, to call them by no harſher appellation, which would attend the legality of general bonds of reſignation.

Here he obſerved, that he ſhould probably be told, that he was guilty of a great ſoleciſm in adducing the inconvenience attending general bonds of reſignation, as a proof of their illegality. But he was not, he ſaid, ſo wholly ignorant of the firſt principles of reaſoning, as to make any ſuch concluſion; he did not aſſert, that the inconvenience he had ſtated was a proof of the illegality of ſuch bonds; but he humbly thought, that where the legality was wholly queſtionable, as it confeſſedly was in the preſent caſe, the inconvenience might have, and ought to have, and would have, ſome weight in determining their lordſhips judgments on the ſubject; nay, he was diſpoſed to go farther, for he thought, that though the inconvenience was not a direct proof of the illegality of the bonds, yet if the matter was to be at all decided by the common law, it was a ſtrong preſumption of it; for the preſumption appeared to him to be well grounded—that what was repugnant to the common intereſt, could not be conformable to the common law of the kingdom; but that general bonds of reſignation were repugnant to the common intereſt of the kingdom, was what ſome of the

judges

judges had ſtrongly intimated, and what few of their lordſhips, he believed, was the matter a *res integra*, would ſcruple to affirm.

He had heard, he ſaid, but four reaſons mentioned, in proof of the utility of even ſpecific bonds of reſignation. One reſpected the binding the clerk to a longer reſidence in his benefice than the law required; the ſecond related to the reſtraining him from enjoying pluralities, in caſes which the law allowed; the third and fourth had reference to the convenience of private families, in preventing the ceſſion of livings by the acceptance of biſhopricks, and in providing for ſons, or other connexions, when they came of age to hold livings. The two firſt reaſons appeared to him to be well founded in law; for it was certainly lawful for a man to give a bond reſtrictive of his natural or civil liberty, provided the reſtriction was for a good purpoſe, for a purpoſe of public utility. But the legal validity of the other two reaſons was not ſo obvious to his apprehenſion; the purpoſe of the bond in either of the caſes was not good; it was good for particular families, but it was not good for the community at large; and it was better that particular families ſhould ſuſtain a little injury, than that the public ſhould ſuffer a great inconvenience. Here, he ſaid, he muſt correct his expreſſion; he was incorrect, he thought, in ſaying that private families would ſuſtain any injury, in having ſpecial bonds of reſignation adjudged to be illegal: There might, according to our preſent notions of theſe things, be ſome hardſhip, but there would be no injuſtice in the caſe; for it ought ever to be remembered, that the *jus patronatus* was a ſpiritual truſt, and could not properly be conſidered as a ſource of temporal benefit. When the right of patronage was firſt granted to lords of manors, and other laymen who built or endowed churches, there can be no doubt that they preſented their clerk to the biſhip, *not conditionally, but abſolutely*, not for a term of years, or to reſign at the requeſt of the patron, but for the whole of his life.

With reſpect to general bonds of reſignation, he ſaid, the matter, it ſeemed, was not now a *res integra*; there had been in the courſe of above two hundred years many adjudged caſes, and that we muſt, it was contended, of neceſſity adhere to the precedents. The *ſtare deciſis*, the *ſtare ſuper antiquas vias*, was a maxim of law ſanctified by ſuch length of uſage, ſuch weight of authority, that he durſt not produce any one of the arguments which ſuggeſted them-

themſelves to his mind in oppoſition to it; though ſome of them tended to queſtion its utility, and ſome of them its juſtice. It was a maxim which his hitherto courſe of ſtudies had not brought him much acquainted with; if was not admitted in philoſophy; it was not acknowledged in divinity; for divines did not allow that there were any infallible interpreters of the Bible, which was their ſtatute book: they maintained that fathers, churches, and councils had erred in their interpretations of that book, in their deciſions concerning points of faith; this, as Proteſtants, they ever muſt maintain, or they could not juſtify the principles on which they emancipated themſelves from the bondage of the church of *Rome*. But be it ſo, let this maxim, as applied to the law, be admitted in its full extent, what follows? nothing in this caſe, he ſaid; for the plaintiff had averred, and one of the learned judges had been pointed in proving, that the caſe in queſtion was not ſimilar to any one of the caſes which had been adjudged in the courts below. Now a ſlight variation of circumſtances, he thought, vitiated the validity of a precedent; and the ground upon which it vitiated it, he apprehended, was this—that we could not tell whether this variation of circumſtance, had it been contemplated by the judge, or the court which firſt eſtabliſhed the precedent, whether it might not have operated ſo as to have produced a different judgment? We were all ſenſible, he ſaid, that when the mind was ſuſpended, as it were, *in equilibrio* by the equal prevalence of oppoſite reaſons in caſes of intricacy, what a little circumſtance would cauſe it to preponderate; and this little circumſtance by which any caſe differed from an adjudged caſe, leſſened, if it did not annihilate, the weight of a precedent *qua* precedent. But let us ſuppoſe, continued he, tho' we do not grant it, that the caſe of the plaintiff is ſimilar, in all its circumſtances, to ſome one or more of the caſes which have been adjudged below; ſtill it will not follow, that the houſe of lords is to be bound by the precedents of thoſe courts; if it is, the right of appeal is a nugatory buſineſs. A precedent is a judgment that has been acquieſced in; but the ſubject is not bound to acquieſce in the judgment of the courts below; he may think that the judgment of thoſe courts is contrary to law, and he has a right to come to this houſe to know whether it be ſo or not; and this houſe in delivering its opinion does not make law, but declares what the law is; the courts below interpret a ſtatute one way, this houſe may ſee reaſon to

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interpret it another, and in that caſe the conſtitution has ſaid, that the courts below miſtook the ſenſe of the ſtatute, and that the interpretation which it receives in this houſe is the right interpretation. Precedents may be obligatory in the courts in which they are eſtabliſhed, and they may there be uſeful, in expediting proceſſes, and in eaſing the ſhoulders of the ſubject from that *great and unavoidable burthen, the uncertainty of the law*; but their operation ſhould not be extended beyond the walls of thoſe courts; it ought not at leaſt to be extended into the houſe of lords. If, indeed, there were any precedents of that houſe, concerning the legality or illegality of general bonds of reſignation, thoſe precedents would have deſerved weight in the preſent caſe; but there was not one precedent of the kind to be met with on their journals; ſo that whatever might be thought as to the novelty of the caſe in the courts below, it was undoubtedly new in that houſe, free and unſhackled by precedent. Their lordſhips' deciſion would on this day eſtabliſh a precedent which their poſterity would revere and follow; it behoved them then—he begged pardon, he did not mean to inform them of their duty, but to attend to his own; it concerned him at leaſt to weigh the matter with caution, to give juſtice on the legal merits of the queſtion, as if it had never been decided in the courts below. —And here, he ſaid, he was fully conſcious of his inability, and he acknowledged it with humility; he was not equal to the full legal inveſtigation of the queſtion. But as it was ſometimes of uſe, to know how the peruſal of a ſtatute ſtruck a plain unprofeſſional man, he would briefly ſtate to the houſe, how the ſtatutes in queſtion, namely, that paſſed in the 31ſt of *Eliz.* and in the 12th of queen *Anne*, to prevent corrupt preſentations to benefices, had ſtruck him. He was ſenſible that the words "general bonds of reſignation" were not to be found in either of the ſtatutes, and conſequently ſuch bonds were not expreſsly *totidem verbis* prohibited by the ſtatutes, and if every thing that was not *totidem verbis* prohibited by act of parliament, was to be conſidered as allowed by that act, then, unqueſtionably, general bonds of reſignation were legal. but he begged leave to conſider the ſubject in another way. During the ſhort time in which he had the honour of a ſeat in that houſe, he had heard many diffuſe and elegant orations on different ſides of the ſame queſtion, by which his underſtanding had been ſo bewildered, and his judgment ſo perplexed, that he had not been able to come at any concluſion, till he had diveſted the debate of all its orna-

ornament, and examined the matter by the dry principles of ſcholaſtic reaſoning. Would their lordſhips allow him, inſtead of dilating on the ſcope of the ſtatutes in queſtion, to ſum up what he had to obſerve upon them in that dry way? A ſyllogiſm, he acknowledged, was not a mode of reaſoning or argument much uſed in that houſe, nor much calculated to conciliate its attention, but it ſerved to compreſs much matter into a little compaſs, and to inveſtigate truth with certainty. The ſyllogiſm which he would propound to their lordſhips' conſideration was ſimply this.—That practice cannot be conformable to the ſpirit and meaning of an act of parliament, which entirely fruſtrates the very end and purpoſe for which the act was originally made:—but general bonds of reſignation entirely fruſtrate the very end and purpoſe for which both the ſtatutes were made:—therefore general bonds of reſignation cannot be conformable to the ſpirit and meaning of thoſe ſtatutes.—How general bonds of reſignation fruſtrated the ends of thoſe acts would appear by a ſingle example. Suppoſe a living to be now vacant, the value of the next preſentation to be 5000 l; the patron, by the 31ſt of *Eliz.* cannot ſell this preſentation; the clerk, by the 12th of queen *Anne*, (*ſee page* 27.) cannot buy it; a general bond of reſignation puts both parties much at their eaſe, the clerk, in conſequence of it, gets full poſſeſſion of his living; the patron the next day ſues his bond, or, without a ſuit, gets poſſeſſion of his money; and thus the vacant preſentation is virtually ſold by the patron, and virtually purchaſed by the clerk, and the legal end and intention of both ſtatutes is *legally*, if general bonds of reſignation be *legal*, eluded and defeated. This, he ſaid, was the way in which the matter ſtruck him; yet he was not quite certain whether he was not out of his depth; ſometimes he thought that he touched the ground, at other times he ſeemed to himſelf to be afloat: the cauſe of his uncertainty was ſimply this; he did not know in what degree we were to be guided by the letter, in what by the ſpirit and meaning, of an act of parliament; he was not fully acquainted with the doctrine concerning the legal latitude of the interpretation of ſtatutes; he would leave, he ſaid, that point to be diſcuſſed by abler judges, and proceed to trouble their lordſhips with an obſervation or two on the oath againſt Simony, and on the form of reſignation. He meant not in what he ſhould ſay on theſe heads to caſt the ſlighteſt imputation on the moral character of the clerk in queſtion; he knew nothing

of

of him farther than this tranſaction taught him, and it was very poſſible for him to have thought, and he queſtioned not he did think, that he was not engaged in an improper tranſaction.

In the firſt place, it was to be obſerved, that every clerk, before inſtitution, ſwore that he had not made any ſimoniacal contract for, or concerning the procuring of his benefice. The force of this oath, he ſaid, depended on the conſtruction of the two terms "ſimoniacal contract." The term Simony was a very complex term; it extended to more caſes than had been enumerated in any law book; but thus much he thought, it would be allowed on all hands, was included in the idea of Simony. Every pecuniary contract entred into by a clerk, by means of which he procured a preſentation to a vacant benefice, and without which he would not have procured a preſentation to it at all, was a ſimoniacal contract;—but a general bond of reſignation was a pecuniary contract entred into by a clerk, by means of which he procured a preſentation to a vacant benefice, and without which he would not have procured a preſentation to it at all,—and therefore a general bond of reſignation (he proteſted that he had not acuteneſs enough to ſee any fallacy in the concluſion) was a ſimoniacal contract. Here, ſaid he, it may be remarked with apparent ſubtilty, that a bond to reſign a benefice is not a bond to procure a benefice; and the aſſertion may afford matter of ridicule to thoſe who are diſpoſed to perplex the argument; but ridicule was not the teſt of truth, it was a cobweb ſpread by artful men to entangle weak underſtandings; and he did maintain, that though a bond to reſign a benefice, and a bond to procure a benefice, were not in words the ſame thing, they were the ſame in purpoſe and effect. The cauſe of any effect, he conceived to be that, which being taken away, the effect itſelf would not take place; but a general bond of reſignation was the *cauſa ſine qua non*, the immediate efficient cauſe of the preſentation; for if the bond was taken away, no preſentation would take place; the bond therefore was a contract for procuring the living; it was the one eſſential mean of procuring it; for without it the living would not have been procured at all.

In the ſecond place he would beg for a moment their lordſhips' attention to the form of reſignation. In the old *Latin* form, and the modern *Engliſh* one was, or ought to be, a tranſlation of it, the clerk who tendered his

his reſignation to the biſhop uſed theſe words—*Non vel metu coactus, vel ſiniſtra aliqua machinatione motus, ſed ex ſpontanea voluntate, pure, ac ſimpliciter renuncio et reſigno.* Now if there was any meaning in language, he contended, that a clerk who had given a general bond of reſignation could not uſe that form. How was it poſſible for him to ſay, that he was not *metu coactus*, when he was conſtrained by the terrors of his bond; that he was not *ſiniſtra machinatione motus*, when he was compelled to the action by all the untoward machinery of the law; that he did it *ex ſpontanea voluntate, pure, ac ſimpliciter*; no, there was no ſimplicity, no purity, no ſponaneity in the caſe; or if any, it was that ſort of ſpontaneity which a man felt when he delivered his purſe to a robber; no, the reſignation did not proceed from the ſpontaneous, intrinſic movement of his own mind, but from the compulſive, extrinſic energy of his bond.

The biſhop concluded by ſaying, that he had detained their lordſhips too long; that he had riſen ſo early in the debate, not from any vanity of expectation that his opinion could have weight with any perſon but himſelf; but from a wiſh to have the judgment which he had formed corrected if it was wrong; for he hoped that ſome noble lord would condeſcend to inform him of the miſtakes he had committed in his reaſoning, as it was but too probable that, in ſo novel a ſubject, he had committed many.

The Biſhop of *Glouceſter*:—My Lords, I beg leave to trouble your lordſhips with a few words on the ſubject before the houſe. I feel very ſenſibly the diſadvantage under which any one muſt appear, who preſumes to call in queſtion the validity of the deciſions of the courts of *Weſtminſter-hall*. I cannot forget, on this occaſion, the peculiar regard that was paid to ſuch judicial opinions in the *Roman* law, which received great additions and improvements from what was called the *diſputatio fori*; and in which the *Reponſa Prudentum*, when collected into a body, conſtituted an eminent branch of the *Jus Civile Scriptum*, and was itſelf, emphatically, called *Jus Civile*. In our own country alſo, the judgments of the ſeveral courts of juſtice have always, and deſervedly, been conſidered as of the higheſt authority, and the ſame rule obtains with us as with the *Romans*, *Res judicata pro veritate habetur*. But however wiſe and ſalutary this rule may be in general, it is not of ſuch a nature as to admit of

no exception: The deciſions of *Weſtminſter-hall* do not *make* law; they do indeed, as Sir *Matthew Hale* obſerves in his *Analyſis of the laws of England*, declare to the parties in a ſuit what the law in a particular caſe is; but they are ſo far from being poſſeſſed of a legiſlative authority, that they are not concluſive even to the parties themſelves; for the matter may be brought to a rehearing before a ſuperior court, and by the judgment of that court, or, in the laſt reſort, by the judgment of this houſe, may finally be reverſed. In the caſe now before your lordſhips, there is not, and, as appears to me, there never has been, a perfect uniformity of opinion, even among the judges; and more than obſcure intimations have been given, that had the matter been *res integra*, and now firſt brought before the courts, they might poſſibly have decided in a very different manner from that which has now obtained, (*ſee page* 76). The noble and learned lord, who, on this and every occaſion which has come before this houſe ſince I had the honour of ſitting in it, has protected, and with ſuch unintermitting vigilance, whatever concerns the intereſts of the church eſtabliſhment in general, and the rights of the parochial clergy in particular, has in the queſtions propoſed by him to my lords the judges, ſufficiently declared his own doubts concerning the validity of the former deciſions; and in ſo doing has furniſhed others with the beſt apology for entertaining the ſame doubts alſo. I admit, in the utmoſt extent, the utility and expedience of the practice of *Weſtminſter-hall*, for judges to abide by the doctrine of former precedents, where the ſame points come again into litigation. Judges may not think themſelves at liberty, in ſuch caſes, to determine according to their own private judgments; they may conceive themſelves obliged by their oaths to adhere, ſtrictly and inviolably, to the judicial opinions of their predeceſſors. The credit, therefore, and what is more, the rectitude, the juſtice of the deciſions of the courts of law remain unſhaken; and yet your lordſhips may have ſufficient cauſe for not permitting their authority to influence your own determinations. The rule, which regulates the conduct of the judges in their ſeveral courts, does not, I apprehend, apply to your lordſhips, even when ſitting here in your judicial capacities. If the cauſe brought to your lordſhips' bar in the way of appeal be in its own nature clear of all the intricacies and ſubtleties of law; if it be of ſuch plainneſs and ſimplicity, that any man of common underſtanding is fully com-

competent to diſcern its conſiſtency or otherwiſe with the law of the land; your lordſhips owe it to your own native ſenſe and dignity, not to addict yourſelves to the words or authority of any maſter, but to conſult impartially your own feelings, and to act agreeably to the convictions of your own minds.

In order to form a juſt opinion of the caſe before your lordſhips, it will be neceſſary to ſtate with accuracy the ſeveral laws concerning it. The only *ſtatute* which any way relates to it is the 31ſt *Eliz. c.* 6. made *for the avoiding of Simony and corrupt preſentations.* But as that ſtatute in *ſec.* 9. expreſsly provides; "that it ſhall not "extend to take away or reſtrain any puniſhment or "penalty preſcribed by the laws *eccleſiaſtical* for any of "the offences mentioned in the act," it becomes further neceſſary, in order to be poſſeſſed of the *whole* law on this ſubject, to conſider what the eccleſiaſtical laws concerning Simony were, before the act of *Elizabeth* was made.

I do not mean to take up any of your lordſhips' time in travelling through the *Roman* canon law, as chiefly contained in *Gratian*'s decree and the Decretals, though it were eaſy to cite from thence a variety of texts, in which Simony is condemned in the ſevereſt terms, as a crime deteſtable in the eyes of God and man. But I would now confine myſelf to what may be called the canon law of *England*, which comprehends, beſides the collections of the *Roman* pontiffs, legatine and provincial conſtitutions; the former made in *national* ſynods under the cardinals *Otho* and *Othobon*, in time of our *Henry* III. and commented on by *John de Athon*; the latter made in *provincial ſynods*, under ſeveral archbiſhops of *Canterbury*, and collected by *William Lyndwood*, who was biſhop of St. *David*'s in the reign of *Henry* V. Nothing can be more clear and preciſe than the definition of Simony by this law: *Simonia eſt ſpiritualium acceptio, vel donatio non gratuita*; the giving of a ſpiritual office by a patron, the acceptance of ſuch an office by a clerk, which is not gratuitous. In the church of *England*, for many centuries, there hath been an oath againſt Simony, varying ſometimes in the form and expreſſion, but in effect and ſubſtance always the ſame. In a provincial conſtitution at the council of *Oxford*, in the year 1222 [*Lyndwood, L.* 2. *de jurejurando, cap. præſenti.*] This oath obliged the clerk to ſwear, *quod propter preſentationem illam nec promiſerit nec dederit aliquid præſentanti, nec aliquam propter hoc inierit pactionem: Propter hoc*, that is, as archbiſhop

Secker explains it, *propter hoc negotium presentationis*, or, according to *Lyndwood*, *ut presentaretur*. By this oath every promise, or gift, or agreement whatsoever, that is made *propter hoc*, for the purpose of procuring a benefice, which is the consideration or cause of procuring it, and without which it would not have been procured at all, is simoniacal. I find no such distinction as that mentioned by the learned chief baron who spoke on *Wednesday*, of *pactio honesta*, and *pactio inhonesta*; for every *pactio* was considered as *inhonesta*, which was the condition of getting the living, however lawful and innocent, and even commendable, such a *pactio* might otherwise be. But it may be suggested here, that the ecclesiastical constitutions, which composed our national canon law, are now at least gone into desuetude; and whatever may have been their authority formerly, they are become obsolete by time. To which I answer, that none of them, I apprehend, have been formally repealed; and, what is more, their validity has been solemnly acknowledged by an act of parliament. The act I mean is not that of the 31st of *Elizabeth*, but another, made many years before, the act of 25th *Henry* VIII. *c.* 19th. In which it is enacted, that "till a review should be made "of the canon law", (and no such review hath yet been made, though your lordships know it was attempted in the reign of *Henry* VIII. and again in that of *Edward* VI. and a third time in the beginning of the reign of Queen *Elizabeth*,) "all canons, constitutions, "and synodals provincial, already made, *should be en-* "*forced as law*, so far as they are not contrariant to "the law concerning the king's prerogative, to the "common law, or to the statute law." It will not be contended, that any of the old canons or provincial constitutions, received here before the statute of 25th *Henry* VIII. which relate to the prohibiting of Simony and simoniacal contracts, are repugnant to the law concerning the *Royal prerogative*, or at all affect it one way or other. And as little can it be pretended that they are contrary to the *common law*; for Simony was never an offence punishable at common law, the clerk being left till the stat. of 31st *Elizabeth*, to ecclesiastical censures only. Though one may just observe in passing, that in the idea of that law the patron of a living was never conceived to desire any emolument to *himself* by exercising his right of presentation. On this principle it

it is, that a guardian in ſocage of a manor to which an advowſon is appendant, cannot preſent to a church, becauſe he can take nothing for the preſentation, for which he may account to the heir: From whence lord *Coke* infers, that "Simony is odious in the eye of the "common law;" and by the ſame author it is ſaid to be "worſe than felony," (*ſee page* 10). And as a farther proof of how malignant a nature it is eſteemed in our law, it hath always been excepted out of an act of general pardon. With reſpect to the *ſtatute law*, the penalties preſcribed by the eccleſiaſtical canons againſt Simony, are ſo far from being repugnant to that, that the very firſt act of parliament that takes notice of Simony, (the 31ſt of *Elizabeth*) declares in ſo many words, that thoſe penalties ſhall ſtill remain in force, and be put in execution, any thing in that act to the contrary in any wiſe notwithſtanding. The penalties themſelves inflicted by the canons were different according to the circumſtances of the offence. If the clerk were privy to the Simony, he was called a Simoniac, and not only *deprived* of that living, but *diſabled* from taking any other: If he was not himſelf a party, *ſi non Simoniacus, ſed tantum ſimoniace promotus*, he was deprived indeed of that living, but not diſabled from holding another. To apply what has been ſaid to the caſe before your lordſhips concerning general bonds of reſignation; if the validity of theſe bonds be tried by the eccleſiaſtical laws, as they now ſubſiſt, and are in force in this kingdom, there cannot be the ſmalleſt doubt concerning their illegality: There is in all ſuch bonds a donation and acceptance that is not gratuitous; there is a gift, a promiſe, a pact, *propter hoc*, in order to gain a preſentation to a benefice, and without which the preſentation would not have been obtained, which is contrary to the oath required to be taken by the laws of the church, and expoſes the clerk to the puniſhment of deprivation, or diſability, or both.

In 1603, another body of canons was made by the clergy in convocation, which alſo received the royal aſſent, though they were never confirmed by parliament: of which canons the 40th requires an oath to be taken by every clerk, before he receives inſtitution from his dioceſan, that he has "made no ſimoniacal payment, "contract or promiſe, directly or indirectly," in order to procure his benefice. This oath, as biſhop *Stillingfleet* remarks, is not merely againſt direct Simony, but againſt

any ſimoniacal contract: It is not limited to the ſtatute of *Elizabeth*; it was not made in purſuance of that act, for it was in being long before; and it muſt therefore be interpreted, not by the words of the ſtatute, but by the eccleſiaſtical laws, as here received. It is preciſely the ſame in effect as that preſcribed by the council of *Oxford* in the year 1222, and if it be interpreted either by the ſenſe of thoſe who at firſt impoſed it (according to which *Saunderſon*, *Grotius*, *Puffendorf*, and the civilians agree that all oaths ſhould be taken), or according to the ſenſe of thoſe who now adminiſter it, it muſt be underſtood, agreeably to biſhop *Gibſon*'s obſervations, to be againſt *all* promiſes whatſoever.

I would now beg leave to treſpaſs a little on your lordſhips' time, whilſt I deliver my ſentiments on the ſtatute of the 31ſt of *Eliz.* This ſtatute appears to me to have two objects: One to bring the matter home to the corrupting *patron*, the tempter and ſeducer to the crime, and to inflict a puniſhment on *him*, which the eccleſiaſtical laws had entirely neglected to do; the other to confirm and ſtrengthen the eccleſiaſtical laws, which, in expreſſing their abhorrence of Simony, had regarded the corrupted *incumbent* only. The patron it puniſhes, by declaring that his *preſentation ſhall be void*, and the right of preſenting ſhall for that turn devolve to the crown. The clerk, it declares, as the eccleſiaſtical conſtitutions had done before, ſhall be conſidered as an *unfit* perſon to take the living, or in the words of the act, *ſec.* 5th, that he ſhall "thereupon and thenceforth be adjudged a *diſabled* perſon *in law* to enjoy the benefice;" which two objects, your lordſhips will obſerve, are in ſubſtance the ſame with the two pleas, urged by the very learned prelate, the plaintiff in error, to the declaration of the defendant in error, to juſtify his refuſing inſtitution. The whole intent of the ſtatute, is to enforce the doctrine of the eccleſiaſtical laws already explained, that all preſentations ſhould be *gratuitous*; and the words it uſes for this purpoſe, are as plain and ſignificant as any words in the *Engliſh* language can be. It inflicts penalties on all perſons, whether patrons or clerks, who for any ſum of *money*, *gift*, *profit or benefit*, or by reaſon of any *promiſe*, *bond*, *covenant or other aſſurance* of any money, gift, profit or benefit, ſhall preſent to or accept a benefice. It is remarkable that the act, although it certainly does mention the word *Simony* at the end of *ſec.* 4th, and although it was made, as the act itſelf ſets forth, *for the avoiding of Simony*, yet does not

not at all explain what *Simony* is; for not only *before*, but long *after* the paſſing of this act, the judges of common law were of opinion, that to determine what is Simony, and what is not, belongs not to the temporal courts, but to the ſpiritual only; as appears from the caſe of *Baker*, 42d of *Eliz.* (*ſee page* 11.) The words *money*, *gift*, *profit or benefit*, in the ſtatute, correſpond to the *donatio non gratuita* of the canon law; the entring into any pact or covenant *propter hoc*, or in order to procure a preſentation to a benefice, is Simony by the eccleſiaſtical conſtitutions; the giving of any thing for the profit or benefit of the patron, voids the preſentation by the ſtatute. To ſay here, that a *bond* given by a clerk, under a large pecuniary penalty, by which the clerk engages to reſign the benefice to the patron, whenever required ſo to do, is not an *aſſurance of any benefit* to the patron, is to hold a language which the common ſenſe of every man, not embarraſſed with legal diſtinctions, revolts at. If a bond, which puts it in the patron's power either to avoid the living, or to recover the money on the bond, whenever he pleaſes, be not a bond for ſecuring a *benefit* to the patron, it will be hard to ſay what is; or what the meaning of that part of the ſtatute of *Eliz.* can be, which enacts that a preſentation *for the benefit* of the preſentor ſhall be void.

However it is a matter not to be denied, that general bonds of reſignation have, by the judges in *Weſtminſter-hall*, been determined to be good in law; and a ſeries of cauſes hath been produced, in which that doctrine hath been eſtabliſhed by different courts. The reaſon, on which every one of the deciſions hath gone, is the ſame; becauſe ſuch bonds *may be* given for a legal conſideration; becauſe where there is a *poſſibility*, that "a tranſaction may "be *fair*, the law will not ſuppoſe the contrary without "proof." The very reverſe of this reaſon appears to be true. A bond, which ſtudiouſly *conceals* the conſideration for which it was given, and which may eaſily be abuſed to the moſt oppreſſive and iniquitous purpoſes, affords a ſtrong ſuſpicion of a bad deſign. If the condition were a good one, why was it not expreſſed, as in ſpecial bonds it always is, in plain words? Where no condition is named, an *unfair* one may, almoſt always, be preſumed. I mean not to enter at all into the conſideration of the caſes alluded to: This argument, I am ſenſible, has been, and is, in abler hands. Suffer me only to obſerve, that at the very time when the legality of

general reſignation bonds was determined by the courts, there were lawyers, and of the firſt reputation, and dignity, who held a contrary opinion. Of thoſe the firſt I ſhall mention, is lord chief juſtice *Holt*: (*Swain and Carter*, *ſee page* 21.) "bonds of reſignation," ſays that great lawyer, "are bad, becauſe eaſily applied to a bad purpoſe; becauſe a round ſum may be ſecured by them; a *good* man will not give ſuch a "bond to reſign". And let me add, neither will a *good* patron require it. To the ſame purpoſe lord keeper *North*, (*Grahme* and *Grahme*, *ſee page*, 18.) "I am not *ſatisfied*, that ſuch bonds are good in law." And later ſtill, lord chief juſtice *Rider*, (*Heſketh* and *Gray*, *ſee page* 22, 24.) at the very time when about to give the deciſion of the court of *King's Bench* in favour of ſuch bonds, becauſe his predeceſſors had done ſo before him, has the following remarkable expreſſion. "It may be ſaid, that ſuch a bond "is void in law; indeed, it does look ſo, but the law is "otherwiſe", meaning by *law* here, not the law of the land, but the law, as ſettled by adjudged caſes in *Weſtminſter-hall*, (*ſee page* 24.) So that your lordſhips will take notice, that even when general bonds of reſignation were thought valid in law, there were authorities againſt authorities, and that lawyers of the greateſt abilities, as well as integrity, have all along conceived them to be illegal.

But as one of the learned barons, who ſpoke on *Monday* laſt, has taught us, the former caſes on reſignation bonds do none of them come up to the caſe before your lordſhips; nor will your deciding againſt the validity of the preſentation now at all diſturb the caſes concerning reſignation bonds, as far as they have hitherto gone. The bond in itſelf may be valid, and yet the preſentation given in conſequence of the bond, may be void: It is not a legitimate way of reaſoning to argue from the validity of one to the validity of the other. Nor is the validity of the bond the point in *iſſue*: The *plea* of the learned prelate is not to impeach the bond, but to impeach the preſentation: The caſe on the 31ſt *Eliz.* now ſtated to your lordſhips is, that the patron made the giving of the bond by the preſentee the *price* of his preſentation; the preſentation was given *propter hoc*, or in conſideration of the bond; and from that circumſtance became a *benefit* to the patron. The goodneſs or badneſs of the bond *in itſelf*, therefore, is not the point in queſtion; all that is affirmed is, that the bond was the *price*, the *reward*, the con-

conſideration of the preſentation; that a bond ſo given is a *benefit* to the patron; and becauſe it is abenefit, that by the ſtatute of *Elizabeth* the preſentation is void.

I might now go on to ſhew, that general reſignation bonds are not only contrary to the whole tenor of the eccleſiaſtical laws of this kingdom, as well as contrary to the plain meaning of the act of 31ſt *Eliz.* but alſo that they are ſubverſive of the law in many inſtances. But this has already, and ſo ſatisfactorily been done by others, that I forbear, and therefore beg leave to conclude with expreſſing my hopes, that the judgments of the court of *Common Pleas* and of the *King's Bench*, complained of by the plantiff in error, will by your lordſhips be reverſed.

Lord *Thurlow*.—His lordſhip obſerved, that the judges, in giving their opinions, had been particularly guarded to prevent the leaſt deviation appearing from the opinions they had already delivered when ſitting in judgment upon the preſent cauſe in the courts below: But one advantage, he ſaid, muſt undoubtedly be derived from that circumſtance, which is, their opinions would be collected in the *beſt* manner; as they have urged, with the utmoſt force, all the grounds and reaſons upon which they formed their opinions; and it was impoſſible for their lordſhips to have too much information; whether it came from the bar, or whether it came from any other quarter; what has been delivered by the judges has been delivered with great ability; and therefore it carries great weight with it, and as ſuch, their lordſhips would undoubtedly receive it; but he fairly profeſſed he ſhould be very happy to learn from thoſe of the noble lords who have already determined upon the caſe, notwithſtanding the circumſtances of their having pronounced their judgment in *Weſtminſter-hall*, the grounds and reaſons upon which they proceeded: Theſe reaſons not being before the houſe, he ſhould proceed as if it ſtood entirely upon that variety of arguments their lordſhips had heard from the judges upon the ſubject; and he would endeavour, as diſtinctly as he was able, to tell their lordſhips the impreſſion they have made upon him; but there was, he obſerved, one other misfortune which attended a judgment in the laſt reſort; it rendered the lords ſomewhat leſs at liberty than the practice of inferior courts enabled them to be.

Lord *Coke*, lord *Hale*, and he could mention many more reſpectable names, were in the frequent practice, when they had any important points to determine, to direct thoſe

points

points to be particularly diſcuſſed, if there was any danger to be apprehended from making a precedent in matters of great importance to the public; and they uſed to break the caſe firſt, and to determine upon thoſe points, to ſhew the general relation they had to the caſe in queſtion before they pronounced any judgment.

He was perfectly ſatisfied, after what the learned judges had already ſaid upon the ſubject of this cauſe, that every other argument their lordſhips ſhould hear at their bar in future would be far different from that which they had heard before.

He would endeavour, though it was impoſſible for him to come fully prepared, to ſtate the ſeveral topics that have been preſſed upon the other ſide, and thoſe which had occurred to himſelf; and he would conſider the weight of the authorities that have been cited. Inſtead of being enabled to read the caſes through in ſo curſory a manner as he has been obliged to do, he wiſhed he could have had an opportunity of having them tranſcribed, and drawn out ſo as to arrange them according to the courſe of argument which he intended to uſe; but not having that opportunity, he would endeavour to ſtate them as plainly as he could.

His lordſhip's opinion coincided entirely with that of all the judges with reſpect to the form of the *laſt* plea; there is matter pointed at in that plea, which, he thought, might be conceived in terms ſufficient to have been a bar to the action; but he thought it would be in vain to argue the matter of it, unleſs he could perceive it to be ſufficient in its preſent form.

He took it to be a clear propoſition, that we had nothing to do with the canon law; he ſhould have more occaſion to demonſtrate that hereafter; but he threw it out of the caſe at preſent; that their lordſhips, as far as they did him the honour to attend to him, may not let their minds be embarraſſed with reaſonings upon the canon law.

He was never fond of reſorting to the conjectures of antiquarians, or that ſort of learning as to the origin of the rights of patronage, in order to build concluſions of law upon them, with reſpect to matters ſo remote and in their own nature ſo uncertain. But it ſeemed to him much more material to ſtate what was the true relation between the patron and incumbent, and the right the biſhop has with reſpect to the office of a clerk. This office in its nature is purely eccleſiaſtical, and is conferred by

by the biſhop. All the right eccleſiaſtical which the incumbent acquires is a right conferred by the biſhop: And he took it to be true, that ever ſince the eſtabliſhment of the church of *England*, this eccleſiaſtical office was an office *for life*. It was not competent to the biſhop to give it for any *leſs* time than for life; and it never was competent to a biſhop of any *European* church that ever he heard of, (and he had made enquiries) to give it for any leſs eſtate, than an eſtate for life. The incumbent therefore derives entirely under, and from the biſhop, an eſtate for life, grounded upon the original conſtitution of the office, and conſequently invariable by law.

If that be the conſtitution of the office, by what rule or principle can it be juſtified at common law, that ſuch an officer ſhould give a bond to his patron, in order to hold the living for a *leſs* term than for life? The queſtion was aſked with reſpect to a bond given by a judge to reſign. What was the anſwer? The bond would be given to the king, and if given to the king, it would be void; becauſe it would render the judges dependent upon the king, inſtead of being independent, as the ſtatute of king *William* expreſſes; that act making their offices *quamdiu ſe bene geſſerint*. A maſter in *Chancery* is an officer appointed for life. Suppoſe the chancellor has the appointment of it: Suppoſe ſuch maſter gives a bond to reſign when called upon, would that bond be good at common law? No; becauſe it is not only contrary to the conſtitution of his office, but becauſe the public has an intereſt in the independence of that officer, as being appointed for life, and a public law officer. His place is independent; it being *quamdiu ſe bene geſſerit*. If he is an officer for life, how can any private man whatſoever, becauſe it is his province to appoint him, take upon him to render that officer's ſituation ſuch as the law ſaid it ſhould not be? He apprehended it would be extremely difficult to juſtify thoſe bonds.

What is the intereſt, and relation which a patron has to the office which hath been deſcribed, as conſtituted in this manner? He has purely a nomination; it is ſuppoſed to have ariſen from this: When the biſhops, either by the general authority imagined to reſide in them, or by authority deputed to them by bulls from the pope in former times, gave the choice of appointing a clerk to thoſe who built the church itſelf, or to great benefactors to the church, that they ſhould have power to preſent to the biſhop a fit perſon for him to judge of, and if he

thought him a fit perſon that was ſo preſented, the biſhop afterwards inſtituted and inducted him: That is the whole of the right of the *jus patronatus*. He was the more poſitive in this, becauſe a very learned writer, who was known to intereſt himſelf on the other ſide, Mr. *Selden*, ſays, the office flows entirely from the biſhop. The conferring the office does not go in any ſenſe from the patron to the incumbent; but it flows entirely from the biſhop; and the patron has purely the right of nominating or preſenting to the biſhop for him to chooſe upon the ſubject: And Mr. *Selden* ſeems to think that when a man is once preſented, as he muſt be by the patron, it is ſtill by the act of the biſhop, he gains his admiſſion: And whenever he grants out of that eſtate any thing that diminiſhes the duration of it, he does it as effectually, as if he had granted part of an annuity out of an eſtate which he could not do. He grants a beneficial intereſt to the perſon, and is ſo kind as to turn him into a tenant for years, which the law ſays he ſhall not be, but a tenant for life.

When he ſtated this as granting a beneficial intereſt, he had not yet heard what kind of anſwer it was poſſible to give it: He had been told, that in fact it was a very beneficial intereſt, and an argument was preſſed to their lordſhips' paſſions. The argument was addreſſed to the avarice of thoſe poſſeſſed of preſentations; becauſe the preſentation grew much more valuable, as it would ſell for much more; and if the law, by a ſeries of deciſions, had ſuffered this practice, it would be unfit to reſcind them, and improper to bring preſentations to their original ſituation.

He doubted much whether any court of juſtice was ever moved by compaſſion to give judgment againſt law, for fear the value of the eſtate in queſtion ſhould be leſſened; he believed not; and therefore till ſome inſtance of that ſort appeared, he ſhould hope that argument would not have great weight.

It has been urged to their lordſhips, that theſe bonds of reſignation were attended with no ſort of inconvenience; and that has been argued with as much ſubtlety as any point in this debate. Nobody contends that the practice is not wicked, deſtructive, and pernicious to the diſcipline of the church, and contrary to the ſpirit of the law under which it was carried on.

He could produce evidence of an offer to ſell an advowſon upon which the purchaſe money was calculated, and

and put upon a general bond of reſignation, and he knew the inſtances of it were exceedingly frequent. What ſignifies its being determined, as it was in *Hobart*'s reports 165, where a man was extremely ill of a ſtrangury at the time, ſo as to be in danger of death, that purchaſing the next preſentation under that circumſtance was held to be Simony? Is not a man under a bond of reſignation in greater danger of the loſs of it than he in the ſtrangury, when it is his patron's intereſt he ſhould not die? It is agreed upon all hands, that this is an indecent and pernicious practice; notwithſtanding which it is ſaid there is no ſort of inconvenience in it.

He was yet to learn what degree of inconvenience there could be in putting an end to theſe bonds. In the firſt place, if it be averred a bond is entred into to get time or any thing of that ſort, it may be ſet aſide; that is ſuppoſing men to deal nefariouſly, and to form their contracts with their original vice in them. If it is ſaid no ſuch contract as that actually paſſed at the time, and if the only contract that paſſed was a condition for a general reſignation, and if afterwards the patron will make uſe of it for advantage: Suppoſe an accommodation in the article of making an incloſure, and the arrangements being made accordingly, and that that was an article that did not exiſt, and was not even in contemplation at the time that contract was entred into; was he to be told, that if an averment was made, that the true conſideration of this bond was to give that advantage, though it had no exiſtence at the time of making the bond, the law will permit it to be evidence of a corrupt agreement at the time. This he put upon the ſuppoſition, the patron is ſo fooliſh as to ſtate to his incumbent at the time he wanted it, he would turn him out if he did not allow him that kind of advantage; and where is the incumbent to be found that would offer that plea, which is falſe with reſpect to the conſideration upon which the agreement was entred into at the time, and which the incumbent muſt know of. He had but little faith in the moral character of a man who would ſign that bond, and take that oath; he would not give him credit for not pleading a falſehood, when he has ſhewn himſelf ready for ſwearing it. Suppoſe, upon a leaſe of tithes being out, the patron might chooſe to turn him out upon his not leaſing them again, though he would not chooſe to tell him his reaſons for turning him out; he might probably think it would make the next perſon behave better; if it is ſaid you cannot do it at common law; but you may go into *Chancery* and get it done. I

have not heard the learned judges anſwer the queſtion, whether it is legal argument to ſay, ſuch is the common law; and if the common law works a miſchief, a court of equity will affect the conſciences of individuals under the ſame contract and make them undo that miſchief the law does. He knew of no relief the court of *Chancery* could give, except reſtraining any ill uſe that might be made of the bond. He would put a caſe: Suppoſe the patron threatened the clerk, unleſs he did contract ſo and ſo, he would turn him out, becauſe he did not like him for not doing it, and as an example for the next man whom he might preſent: Would any learned lord lay it down that he could do that? Could you interrogate that man as to any idea he might have at the time he took the bond? Could you aſk him as to any propoſal of contract? Would he ſay any was made at the time? Can you aſk him whether he would turn him out or not, for not continuing the leaſe, when he has had no converſation with him about it? He did not know that *Chancery* could do that: *Chancery* and common law are totally inſufficient for that purpoſe.

He agreed with the doctrine laid down by all the learned judges, which was, the bond at this time, whatever other objections there may be made to it, or whatever other objections it may be liable to, is not capable of being avoided, but by averments of a bad conſideration and uſe; and if you cannot aver upon it in that manner, whatever the canon law may do with it, by the common law it cannot be reſcinded. It has been queſtioned, whether the courts ought to make a difference between theſe bonds and marriage brokage bonds? Abundance of caſes might be put, which would be taking up too much of their lordſhips' time, to ſhew that it is impoſſible to avoid theſe bonds at law; for which many reſolutions may be cited. There is a caſe, which he took to be a definitive one, upon that ſubject, in *Shower's Parliamentary Caſes*, under the name of *Hall* and *Potter*, (*ſee page* 25.) It was a bond full of great inconvenience, and it was ſaid the law ought to put an end to it, being capable of being turned to much miſchief by guardians, truſtees, and executors, who had great power and influence with minors. It was an ill example to ſuch perſons, and it was fit a rule ſhould be laid down univerſally to aboliſh ſuch bonds. If the learned judges would acknowledge the infinite miſchief, ſcandal, and prejudice, reſignation bonds were capable of doing, and which they were

were frequently applied to, though impoſſible to find them out, and they were to follow the example of the marriage brokage bonds, then might *Chancery* afford ſome tolerable relief againſt the inconvenience of them. The caſe alluded to was not a nice caſe in itſelf, but it was *new:* It was determined one way by the chancellor, another way by the maſter of the rolls, and the decree of the maſter of the rolls in the end was affirmed in that houſe. It was argued as here, that the bond ought not to be ſet aſide, unleſs you could affect it diſtinctly, as if you was to plead to it at law; unleſs you could affect it with the avowed conſideration. But it was reſolved that the inconveniencies of ſuch bonds were ſufficient to ſet them aſide.

Reſignation bonds are full as pregnant with inconvenience and ruin to the church eſtabliſhment as any of thoſe bonds he had been mentioning were to the civil order of ſociety. But the court of *Chancery* has not protected them; the conſequence of that is, they are left to ſhare ſuch fate as they may according to the deciſions of law.

It was alſo ſaid, that this act of parliament allowed of general reſignation bonds, according to the old canon law; and in order to make that out, canon law was cited out of biſhop *Stillingfleet*'s works; and it was ſaid, if it appeared that the contract was in terms corrupt within the act of parliament; yet, unleſs it was *proved* corrupt, it ſhould not be determined to be ſo. Then it was argued, there were ſuch things by the canon law as *pactiones honeſtæ*, as well as *pactiones inhoneſtæ*; afterwards it was contended, that there muſt be deciſions to prove the contracts for ſuch bonds were void in law; and unleſs it was ſo proved, they might be taken to be entred into by the *pactiones honeſtæ*, and conſequently they ſhould be deemed good according to the canon law, and not within the *pactiones inhoneſtæ*. He took every one of thoſe propoſitions to be groundleſs; in the firſt place, that there were any *pactiones honeſtæ* by the canon law he denied. In the next place, he denied that biſhop *Stillingfleet* ſaid there was any *pactio honeſta*. The *pactio honeſta* which *Stillingfleet* mentions is a contract for the payment of the fees due upon preſentations, like a contract for procurations and other fees; it is ſo old, that it its quoted in the *Jus Patronatus*, and at a period of time when antiquarians were debating upon that ſubject; when there were great diviſions in the church, which was the origin of an infinite variety of penſions, and theſe *pactiones* were contracts upon the foundation of the church fees. Where a church

is in litigation, and parties ſpend a great deal of money *hinc & inde* upon the queſtion, Whether it is lawful, without imputation of Simony, to pay that money, or any ſum of money in lieu of thoſe coſts? To obtain a quiet exoneration from that ſuit, it was determined ſometimes one way and ſometimes another; the better opinion was, it was purely for coſts, and this the canon law admits. Therefore the principle is right: It ſhould be done under the authority of the church, that the law may be ſure no part of the money is applied to any other purpoſe.

Lord *Thurlow* here cited ſeveral paragraphs from the controverſy between the biſhop of *Worceſter (Stillingfleet)*, and the biſhop of *Saliſbury (Burnet)*, reſpecting bonds of reſignation.

Upon this ſubject, his lordſhip obſerved, that whenever a biſhop collates to a prebend or any other benefice, he ought to do it freely, and without any previous agreement whatever; but, notwithſtanding this, it was, it ſeems, the practice of biſhop *Burnet*, before he collated to a prebend, to require a bond to this effect, namely, that when the prebendary quitted the dioceſe he ſhould reſign the prebend. This the biſhop of *Saliſbury* conſidered as a *pactio honeſta*, but this notion biſhop *Stillingfleet* ably confuted; and, towards the concluſion of his diſcourſe, made this appeal to the biſhop of *Saliſbury* himſelf: —"Now I appeal to the biſhop of *Saliſbury*, ſays he, whether a prebend without a bond of reſignation be not more valuable than a prebend with one, and conſequently a bond of reſignation is a diminution of the real value."— The biſhop of *Saliſbury* returned no anſwer. There can be no doubt of the concluſion which his lordſhip drew; and it is moreover ſaid, that he diſcontinued the practice of taking bonds from that time.

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This is the firſt ſection of the act, which goes to the caſe of bonds. Suppoſe the bond in queſtion given, and the plea had been, he gave this bond in conſideration of obtaining that preſentation, and that the patron had accepted it upon that conſideration, and that he did preſent him accordingly; *that* muſt be the plea: if it falls ſhort of *that*, it does not come up to what it ſhould; it does not apply to the only point that would ſerve to avoid theſe bonds.

To ſteer clear of the caſes: Can any thing be wilder to all common appearance (he ſhould ſee whether the authorities ſupport it afterwards) than for a number of learned men to allow ſuch a bond is a benefit, and then to argue it is not a benefit within the ſtatute. Why is it not a benefit within the ſtatute? Becauſe it is ſaid there are caſes which have ſaid it is otherwiſe (he ſhould ſee that when he came to the caſes); but ſuppoſe it is *res integra*, and there were no ſuch caſes as that, then the argument is this: It is a benefit, and the ſtatute ſays if it is a benefit it ſhall be void.

It is ſaid this a benefit, but not within the ſtatute: The ſtatute has ſaid, all benefits. Why is not this a benefit within the ſtatute? Not one of the learned judges have attempted to ſay it is not a benefit, but they qualify it by ſaying it is not *corrupt*.

All they inſiſted upon was, although it be a bond for a benefit, and the ſtatute in terms has condemned all benefits, this *ſhould* not be a benefit within the ſtatute. Such doctrine ſhocks, diſgraces common ſenſe; there is no reconciling it with the dignity and propriety of adminiſtring juſtice. Unleſs he could hear ſome argument, by which his opinion was ſhaken by any other conſideration than that, it rather confirmed and ſerved to make it clearer.

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There was another queſtion he took the liberty of ſubmitting to their lordſhips, as fit for the judges to determine, and which they declined anſwering. He was ſorry for it: He did not take it to be totally out of the line of this caſe, or arguments at the bar. Some of them ſeem to have agreed in their anſwers, that the biſhop cannot be compelled to accept a reſignation. In the caſe there put, ſome ſeem to think a *mandamus* might be neceſſary for enforcing it. In a matter new, and upon an important point, to decide it by a proceſs purely of a ſummary nature and unappealable (there being no writ of error upon it), is making more of a *mandamus* than ought to be made of it. A court of *Chancery* is in the nature of a *mandamus*, and whatever was determined upon it there would be appealable here, and as the world would know what was done upon it here, he wiſhed it to be conſidered a little more.

His lordſhip ſaid, it was extremely difficult to get the regulations of the ſtatute carried into ſpirited and ſucceſsful execution. How are they to be carried into execution, when it is reckoned an unfavourable caſe for a man to take advantage of a penal ſtatute to avoid a contract ſo entred into? Of what uſe is the ſtatute which ſays ſuch compact is void, if it is not to be held ſo? If a patron gives a bond to a perſon to pay him a penſion of 50 l. a year, in caſe he will reſign his living, that bond will be void; as was determined two years ago, in the caſe of *Young* and *Jones*; which was this: A patron of a vicarage applied to the vicar, an old man and infirm, and propoſed to him if he would reſign his vicarage, he would give him a bond to pay him a yearly annuity juſt equal to the income of his vicarage; ſo that he was not to loſe, and he was not to gain; he was to have an annuity equal to the annual value of the living during his life. The inducement of the patron to do this was, to give the living to another perſon that was to give a bond of reſignation, for the ſon of the patron who was at the univerſity: The vicar reſigned; the penſion was in arrear, and he brought an action upon the bond to be paid thoſe arrears. It was a matter of a great deal of litigation and argument, whether this was a corrupt reſignation within the meaning of the ſtatute, becauſe it was with an intent to make a corrupt preſentation. It was admitted, if it was with intent to let in a corrupt preſentation, it was within the meaning of the ſtatute; but it was to let in a preſentation with only a bond of reſignation to be entred into.

Young & Jones.

into. No body made a doubt but if it was within the ſtatutes the bond was void. The court determined, that as it was for money, it muſt be looked upon as a corrupt reſignation; and, as a neceſſary conſequence, the bond was held to be void; conſequently, there was judgment for the defendant.

Suppoſe a ſum of money paid to a parſon, as a conſideration to induce him to give a bond to reſign, and the parſon is ſued upon that bond, would it not be corrupt when a ſum of money was given? The ſtatute ſays no reſignation ſhall be for money or benefit of any ſort; he took it, *that* would be a void bond. Suppoſe the contract were, that the patron ſhould procure him another living of equal value, to induce him to give a bond to reſign, would it not be a bond given for a reſignation under the inducement of a benefit ſecured to him? Would that be demurrable at law, or pleadable?

In regard to the preſent bond, it is ſaid to be a benefit, yet it ſhould not be deemed ſo. In order to enforce this doctrine, their lordſhips were put in mind of a caſe determined here a little time ago. He did not want a better caſe than that to enforce the true line to be drawn upon this judgment. The queſtion there was, Whether upon a lapſed deviſe, the eſtate ſhould go to the heir of a deviſee, or whether it ſhould not go over to the ſecond ſon? The determination in that caſe was according to a principle of the feudal law, which could not be aboliſhed without an act of parliament. He remembred the alarm lately raiſed in *Weſtminſter-hall*, when the rule of law eſtabliſhed by the determination of the caſe of *Coulſon* and *Coulſon* was violated by the doctrine laid down in the deciſion of the caſe of *Perrin* and *Blake*; and ſaid, that if twenty courts after the court of *King's Bench* had decided in like manner as that court had done, in the caſe of *Perrin* and *Blake*, he ſhould go by his own opinion in reverſing that judgment, in order to reſtore the rule of law.

The caſe of White & White, which ſee in the Appendix.

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His opinion was, that the point in this caſe had never been decided. Their lordſhips had been told pretty roundly it had been ſo; but no ſuch caſe was before them. No ſuch caſe is to be found in any book whatſoever. He admitted, that general writers have looked upon deciſions to be ſo: and when the learned biſhop *Stillingfleet* wrote, in 1695, he had no body by his elbow to ſhew him the caſes had not been ſo decided, as was obſerved before. He was ſatisfied, if the argument of

one of the learned judges, which their lordſhips heard laſt *Monday*, had been in the poſſeſſion of the biſhop of *Worceſter*, this caſe would never have been argued here. When he ſaid, that it had not been decided, it would turn mainly upon this propoſition: Whether in any one of the caſes that had been cited, the plea was ſufficient to bar the bond, upon the foundation of its having been given for the purpoſe of obtaining a preſentation.

He was aſtoniſhed to hear this argument, ſtated as it was on *Monday*, purſued as it was upon *Wedneſday*, and went through ſo many hands without an iota of anſwer being given to it, except the general ſaying of one of the judges, that he apprehended it appeared ſufficient upon the ſtate of the bond itſelf, that it muſt have been ſo decided. He could have wiſhed to have heard ſome authority quoted for it; his notion was, it did not appear ſufficiently from the ſtate of the bond itſelf, that it could be ſo decided.

There were three different conſiderations which he could wiſh to ſubmit to their lordſhips, becauſe the caſes apply to them all. The firſt was a queſtion to know, Whether it was poſſible to go beyond the condition of the bond, upon any ſuch occaſion as this, in order to avoid the bond? At the time thoſe caſes were decided, the law was clearly held you could not do that.

The ſecond queſtion, or doubt, was, Whether Simony, either at common law, or under the prohibition of the ſtatute, was the ſort of objection, which being pleaded to a bond would make it void? At the time we are now ſpeaking of, it was clearly held in law it would not; as in *Moore*, 564. The caſe was adjudged for the plaintiff, becauſe, *&c.* *(See page* 14.)

The ſame reaſons run through a great variety of other caſes, which make all the determinations nothing to the purpoſe; becauſe the point is ſimply, Whether the preſentation is void in law?

The next conſideration is, Whether it is neceſſary to be averred in the plea, that any bond was given for the preſentation? and it muſt be given *in order to procure the preſentation.* It was a long time a notion, that you could not go out of the condition of the bond in order to avoid that bond. This was determined in a caſe in *Noy*, 25. In *Oldbury* and *Gregory*, mentioned before, *(ſee page* 14.) and in *Noy*, 72. The law is likewiſe laid down in that manner in lord *Coke*, 3 *Inſtitute*, 153, and there he diſtinguiſhes

tinguiſhes between the *malum in ſe* and the *malum prohibitum*, the *malum in ſe* by the common law, and the *malum prohibitum* by the ſtatute. He ſays it may be done in the *malum in ſe*, but not in the *malum prohibitum*.

He would now refer their lordſhips, as well as he could, to the caſes that were originally determined upon this ſubject. The firſt was that mentioned before, of *Oldbury* and *Gregory*. It was ſaid there was a caſe of *Webb* and *Hargrave*, (*ſee page* 41.) in which the contrary was determined. That was diſtinctly to his point. It fell out two years after *Gregory* and *Oldbury* was determined. A clerk entred into an obligation, &c. (*See page* 41.)

Lord *Thurlow* then cited the caſes of *Pyke* and *Pullen*, (*ſee page* 25.) *Birt* and *Manning*, (*ſee page* 40.) *Heſketh* and *Gray*, (*ſee page* 22.) and ſeveral others, to ſhew that the point in queſtion before their lordſhips was never determined.

With regard to the caſe of *Jones* and *Lawrence*, and *Babington* and *Wood*, it will be found in point of fact they were determined, not according to lord Ch. J. *Ryder*'s opinion, in the caſe of *Heſketh* and *Gray*; becauſe, when a court, after they came to a determination upon a particular point, which is ſufficient to bar the action, think proper, by way of illuſtration and argument, to go into a general diſcourſe upon ſuch bonds, which is very often done, and properly upon a number of occaſions, you are not to take it as a deciſion upon the points which are *not* before the court; and in the caſe before his lordſhip, Simony did not appear upon the condition of the bond: It was no better than an argument at the bar. It was ſaid to be a caſe to the preſent point; but it was nothing like it.—Lord *Thurlow* obſerved, that his opinion was againſt that of a great number of judges, and he had the concurrence only of one of them.

When he was ſpeaking of judges, he remembred perfectly well what lord *Hardwicke* had ſaid, and he would never, ſo long as he ſat there, refuſe delivering his opinion upon any ſubject; he was not to wave his own opinion upon the general arguments of judges. In the caſe of *Grahme* and *Grahme*, reported in 1ſt *Vernon*, (*ſee page* 18.) lord keeper *North* is diſtinct to this point, if he underſtood any part of the law more than another, it was his knowledge of the forms and practice of pleading. He was not ſatisfied that ſuch a bond was

good; the point had never been decided. That was the opinion lord keeper *North* held at that time, an opinion which lord *Thurlow* confeſſed right upon the beſt conſideration he could give the point: And what made him ſtronger in his opinion was a caſe that has been the occaſion of ſo much diſcuſſion. It is that of *Paſchal* and *Clarke* (*ſee page* 16.) and a vaſt deal of diſcuſſion has been introduced upon that caſe: He had heard nothing yet ſaid againſt it; but only they reaſoned ſo and ſo in it; and one reaſon was given, namely, that ſuch pleading would enſnare the parties. The caſe of *Paſchal* and *Clarke* is more remarkable, becauſe it is, properly ſpeaking, the only deciſion in the books that turns upon the queſtion of reſignation for the reaſon mentioned before. In that caſe it was laid down as the expreſs reſolution of the judges, that thoſe bonds were void. This was upon a *quare impedit*. That book was not compoſed by its very learned author Mr. *Noy*, for the preſs; but was made up purely for his own uſe as a practiſer of the law. It was not too much to ſay, that a man whoſe reputation was received in the world like his is not to have his book toſſed away as if it was the traſh of a hackney writer; that is not the way a book of that ſort deſerved to be treated; it agrees with the roll in which that caſe is to be found; and upon the roll the caſe appears to be this: The plaintiff upon a *quare impedit* ſtated the laſt preſentation, and then ſtated the vacancy by the death of the laſt incumbent. The defendant in anſwer to that ſays, he admits the death of the laſt incumbent; but he alleges that the benefice became void *before*; becauſe there was a corrupt agreement, between him and one *Veſey*, for a ſum of money, in order to be preſented, and accordingly *Veſey* was preſented and inducted, and upon the ſtatute of the 31ſt *Elizabeth* the preſentation was void, and it belonged to the queen to preſent. Then he ſtated his title under the queen. After that he traverſes, that the living became void by the death of *Veſey*, as the plaintiff in his declaration alleges. The defendant joined in that traverſe, and the cauſe of diſpute was, becauſe it was ſaid the living became void by reaſon of his paying money, when in fact it became void upon another conſideration, namely, the giving a bond.

Here his lordſhip made ſeveral obſervations on the nature of an inducement to a traverſe; he cited authorities

to

to prove his opinion, and ſaid that the determination of the judges in the above caſe in *Noy* was right.

Theſe were his reaſons for ſaying that, in point of fact, there had been no judicial deciſions in favour of ſuch bonds; but, on the contrary, there has been a judicial determination that theſe bonds were void, namely, that caſe in *Noy*. He confirmed himſelf in that opinion by the obſervation made by lord keeper *North* in the caſe of *Grahme* and *Grahme* (*ſee page* 18.) He lamented that the arguments in a caſe of this ſort, where ſomething appeared that never was yet decided, run in a circle: For that this is a benefit is allowed, and the act of parliament forbids preſentations that are made by reaſon of any benefit whatſoever. Why not declare this to be a benefit, which *eo nomine* is prohibited by the act of parliament, notwithſtanding a parcel of books one after another run into the notion that the point has been decided, which upon a cloſer and more exact inveſtigation turns out not to be decided at all.

It is ſaid, theſe bonds are matters of great convenience, and it would be attended with great inconvenience, if they were aboliſhed. He remembred an old gentleman of eighty, who ſaid, he had ſerved upon ſpecial juries at every aſſize for fifty years of his life, and, thank God, he had never differed in opinion with the judge that preſided. Certainly that argument will not prove that thoſe judges have decided right: He did not think their lordſhips would go upon that ground in this caſe, and he made the ſame motion as the learned biſhops who had already ſpoke upon this caſe before him; that this judgment be reverſed, and that judgment be entred for the plaintiff in error.

The Earl of *Mansfield* obſerved, that the judges would have been extremely happy to have been eaſed of the trouble of their attendance upon that occaſion, if they had thought it conſiſtent with their duty and reſpect to that houſe; but their lordſhips' order was general without any exception of any of the judges; and it always has been ſo; and the judges are bound to obey that order: And when a writ of error is from one court only, he has known *all* the judges of that court to attend, if it was a matter of importance and difficulty.

But originally if a writ of error was from one court, and there remained a majority of the judges, they did not think themſelves bound to attend, and their lordſhips were ſo indulgent as to excuſe them. But where

a writ of error was from a judgment by a majority of the judges, there they always look upon themſelves as bound to attend, and that is the caſe of all writs of error both from the *King's Bench* and *Exchequer Chamber*. After they had given their judgment, it was certainly of uſe and aſſiſtance to their lordſhips to hear the reaſons of that judgment, and upon any new incidental matter that might ariſe upon it: And the very next caſe in which they had to attend and give their judgment, was a caſe in which all the judges of *England* had given their opinions, [the caſe of *Fanſhaw* and *Cockſedge*, relating to a toll for corn imported into *London*, determined in the houſe of lords *June* 3d, 1783;] and yet their lordſhips' ordered them to attend; not to know how they had given their judgments; the record ſhews *that*; but to anſwer ſuch queſtions as may be of uſe to their lordſhips: And he owned he was ſurprized, the noble lord thought it poſſible, that any judge, from having given judgment upon any point of law, could have the leaſt attachment towards ſupporting that judgment, and would not come to a rehearing juſt as open as if he had never heard it before. There was nothing ſo common as to appeal from the ſame judge, and nothing ſo common as for him to reverſe his own judgment; and he had not an idea, that any man that ſits in judgment could have the ſmalleſt reaſon to have any objection to reverſe a judgment that was wrong; if they have any leaning, it was a leaning the other way; and having heard one ſide of the queſtion, and having doubts upon it, a judge may put himſelf into a train of thinking contrary to what he thought before, that he might get at the truth of it; and for one, if he was ſatisfied that the ground upon which *his* opinion reſted, was erroneous, he ſhould have a pride in moving to reverſe that judgment.

What wiſh can any man have that bonds of reſignation ſhould be held good or bad? What private wiſh in a caſe like this, that if they are wrong, they ought not to be ſet aſide by their lordſhips' judgment, or by application to the legiſlature?

His lordſhip thought himſelf called upon in ſome meaſure to ſay upon what ground his opinion reſted, that this houſe ſhould not reverſe this judgment; and he owned it is upon the ground of its being a matter that has been looked upon and conſidered by all *England* as ſettled ſucceſſively from a period of time of near two hundred years; that is, almoſt from the making of the ſtatute, and been ſo conſidered and determined, by judges of all denominations.

He

He ſhould be very ſhort in what he had to ſay upon this record.

The 2d plea was laid out of the caſe univerſally: We had nothing to do with the canon law upon it: We had nothing to do with the nature of the office of a clerk, or the conſequences of it; they were general reaſonings.

The caſe ſtood ſingly upon this propoſition, whether an agreement by a general bond of reſignation in conſideration of a preſentation was by the 31ſt of *Elizabeth* ſimoniacal, corrupt and void; ſynonimous words; he uſed them as ſuch, ſimoniacal, corrupt and void; that was the only queſtion.

Was ſuch a bond, without any other collateral agreement but the bond, from the nature of it, from the intrinſic form and ſubſtance of it, that is a bond to reſign under a penalty upon requeſt; whether ſuch a bond was within the ſtatute of the 31ſt *Elizabeth*, it being in conſideration of the preſentation, that was the queſtion here.

Now that this queſtion had for above a century been conſidered as ſettled is clear by adjudged caſes; and that upon ſuch bond the agreement is fair and legal, and conſequently neither corrupt nor ſimoniacal, nor within the 31ſt of *Elizabeth*.

The tendency of a corrupt agreement and the conſequences of it, he thought, may appear in judicature in different ſhapes. It may appear as it did then in a *quare impedit* between the biſhop and perſon preſenting: It may appear in an action between the obligor and obligee of ſuch a bond: It may appear upon a preſentation by the crown for Simony: It may appear upon an information or action for the penalties inflicted by the ſtatute; but in whatever ſhape it appears the queſtion was the ſame.

Is the agreement corrupt? Is it ſimoniacal? If it is, it is followed with all theſe conſequences; it is followed with the forfeiture of the turn; it is followed with the penalties; it is followed with the avoiding of the bond and agreement.

It is true that the actions that have been tried have been between the obligor and obligee; but ſtill the queſtion is, is the agreement good or bad within the ſtatute of the 31ſt of *Elizabeth?*

Now two objections were made the other day, and have been very ably enforced this day, to ſhew, that this very caſe was not within the authority of the caſes that had been determined.

He would ſtate them as accurately as his memory enabled him: The firſt diſtinction was this: That in the caſes that have been adjudged, it did not appear that the re-

reſignation bond was given *previous* to and in conſideration of the preſentation.

The ſecond was this, that the bond was good, but the preſentation bad; the bond being good becauſe the 31ſt of *Elizabeth* dont ſay that it ſhall be void.

Another ground mentioned was, that in the caſes adjudged, there was a want of a proper averment to bring the point properly before the court.

The firſt is, that it did not appear in the other caſes, that the reſignation bond was previous to and in conſideration of the preſentation. In the firſt place, *that* diſtinction is not taken in any one of the caſes; nor any objection made, nor any point turning upon that objection, that it was not made in conſideration of the preſentation.

Another thing is, it is impoſſible there ſhould be ſuch a bond given which is not in conſideration of a preſentation, and purſuant to ſome agreement concerning it; for would any man in his ſenſes that has got a living, and been inſtituted and inducted, give a bond of reſignation? It is impoſſible, if it went no further than that. No man in his ſenſes would give a bond of reſignation and have no view of any thing. It muſt be in conſideration of the preſentation, or there is no agreement at all to be carried into execution. But ſome of them do expreſsly mention in the condition of the bond, that they were in conſideration of the preſentation. It does ſo in the caſe of *Babington* and *Wood* expreſsly: (*ſee page* 16.) it is ſaid expreſsly in the condition, that the plaintiff intended to preſent the defendant, and intending to preſent him, he agreed to give and did give ſuch a bond: And in *Heſketh* and *Gray* it is particularly ſtated in theſe words, that before, *&c.* (*See page* 22.)

The next objection ſtated was, that the bond was good, but the preſentation void: That is very extraordinary, and biſhop *Stillingfleet* treats it as a moſt abſurd thing indeed; that it was a good agreement in reſpect of the bond, and a bad agreement in reſpect of the preſentation, and that which was corrupt in itſelf could be good in a bond, and bad in a preſentation.

In the caſe of *Jones* and *Lawrence*, the objection is made that the bond is void for Simony, *&c.* (*See page* 15.)

The next is the caſe of *Babington* and *Wood*; there it is objected, it is Simony and againſt law, and ſo the bond was void, *&c.* (*See page* 16.)

In

In the caſe of *Mackaller* and *Todderick* in *Croke Charles* 361. there the conſideration of Simony was a ſimoniacal contract, which was held to be void. The ſtatute dont avoid the contract; yet it was held void, and no action would lie upon it.

Lord *Holt* ſaid in *Carthew* 301. (*ſee page* 40.) the obligor is admitted in the caſe of Simony to aver againſt the condition of a bond, or the bond itſelf. For what purpoſe? To defeat the bond? Then the propoſition is not true, becauſe the ſtatute dont make the bond void; therefore it dont become void.

In another caſe in *Carthew* 252. Lord *Holt* ſays, every contract, *&c.* (*See page* 19.)

He had, ſince he had learned any thing of law, taken this doctrine laid down by lord *Holt* to be good, that is, where a contract is prohibited by a ſtatute, or has penalties annexed to the doing it by ſtatute, it is void as between the parties, and that no action can be brought upon it. He never heard it doubted ſince he had been in *Weſtminſter-hall*, but that a contract reſpecting a matter prohibited by act of parliament is void. It is like ſtock-jobbing and ſmuggling contracts; becauſe it cannot be relieved againſt in a court of juſtice; it being upon an illegal foundation. It cannot be defended; the court will not aſſiſt him. A caſe happened about a year ago upon this very ſtatute upon a clauſe relative to reſigning a living. The caſe he would ſtate from memory; it was very particularly circumſtanced, a patron of a vicarage applied to the vicar, *&c.* (*See page* 162.)

In the caſe of *Peele* and the earl of *Carliſle* (*ſee page* 22.) the court refuſed to let the defendant the earl of *Carliſle* argue againſt the validity of ſuch bonds; they having been often eſtabliſhed even in a court of equity. There is no doubt a court of equity would give relief, if the bond was for a ſimoniacal purpoſe. They have granted injunctions upon ſuch bonds.

Thoſe caſes are at laſt followed by one ſo late as *Heſketh* and *Gray* (*ſee page* 22.) where the bond was held to be fair, not upon any particular point of pleading, but upon the caſes determined before; that was in the 28th of the late king, which brings the deciſions from the 8th *Jac.* 1. to the 28th of the late king. But the concluſion drawn from thoſe caſes by the whole kingdom was very important for their lordſhips' conſideration; for it was moſt certain that they were underſtood to be determinations of the point, that ſuch a bond for ſuch a con-

conſideration was good, and not within the ſtatute, ſo long ago as the year 1675, as appears in the 4th *vol.* of *Gray*'s parliamentary debates, when a motion was made in the houſe of commons for a bill to prohibit general bonds of reſignation, it having been ſettled and eſtabliſhed that they were good: Some little time was taken in debating it, and then it dropt, and went no further.

But in the year 1695, *Stillingfleet*, biſhop of *Worceſter*, whoſe character was very well known to their lordſhips, wrote expreſsly upon bonds of reſignation.

He takes it for granted that by the caſes already decided the point was determined for the preſentation as well as for the bond; that both were good: And he reſorts as a kind of refuge from thoſe determinations to the oath of Simony as an argument to the conſcience of thoſe that take it; but he takes the point for granted, that the determination went to the preſentation as well as to the bond, that the one was a fair agreement in conſideration of the other; and indeed of what conſequence would it be that the bond ſhould be good, if it did not follow, that the preſentation ſhould be good alſo?

Another great authority for ſuch bonds is biſhop *Gibſon*, His work was firſt publiſhed about the reign of king *George* I. he writes ſtrongly againſt reſignation bonds; but he takes for granted that the authority that eſtabliſhed the bond to be good made the preſentation good. As to the conſequence, he recommends to the biſhops one or two ways to get rid, in order to prevent the miſchief of them. Firſt, they were to take care who they ordained: Next to take care to refuſe the reſignation of thoſe who had given ſuch bonds; and that where Simony is committed, the living is forfeited; and the next thing to that is, the penalties are incurred; but that he had no idea of.

His lordſhip would not go into the argument at large: when the matter was *intire* and no deciſion upon it, it was a diſputable queſtion. Their lordſhips had heard from the judges on the one ſide the reaſons upon which they apprehended the caſes to have gone. They had heard very ſtrongly upon the other ſide arguments to the contrary; and certainly it might have admitted a difference of opinion; but ſince it has been judicially eſtabliſhed, there is a period when it is wiſer, better, and ſafer not to go back to arguments at large. He did not know where it would lead to. Were any man to go back to argue at large upon the ſyſtem of law that has

has been built upon the ſtatute *de donis*, he did not know that it could be maintained upon arguments; and were any man to go back and argue upon the general reaſoning and ſyſtem of law upon the ſtatute of uſes, he did not know they could be ſupported upon general reaſoning; but being once eſtabliſhed, it is better they ſhould ſtand erroneous, than by contrary judgments to overturn what has paſſed. Where it is without miſchief to the parſon, it is not of much conſequence, and perhaps not much hurt in it; but where it is otherwiſe, it is of very ſerious conſequence and conſideration.

The object of the law is *certainty*, eſpecially ſuch parts of the law as are of extenſive and general influence, which affect the property of many individuals, and which inflict pecuniary penalties; which create perſonal diſabilities; and which work forfeitures of temporal rights. It was of vaſt conſequence *ſtare deciſis*; no man could perceive the miſchief of a contrary practice; it was an object of the utmoſt importance to that judicature for many reaſons. In the firſt place, becauſe they were under no controul: In the next place, if a wrong rule of law had crept in, they could rectify it in their legiſlative capacity; and he could by no means agree to what dropped from ſome of the reverend prelates, that they were not to judge by rules laid down by the law courts below; and that they had a judgment and rules of their own: *That* he held to be quite unconſtitutional. They were to give that judgment which the courts below ought to have given in their opinions. They did not ſit in a legiſlative capacity. They were not to be governed by any other rules but the rules of law, equally belonging to the courts below and that judicature; and the judgment they pronounce muſt be that which the judges of the courts of law, properly informed, *ought* to have given. Conſider the conſequences of ſetting aſide at this diſtance of time all that has paſſed with regard to this point.

Biſhop *Stillingfleet* complained, that there were many caſes of the kind: Many very worthy men who never meant to make a bad uſe of them have taken bonds of reſignation. He alluded to it as matter of general knowledge. He did not care to mention names. They all heard of many; the intent of them never was for a bad purpoſe originally. A biſhop of *Saliſbury* himſelf took them, and took them openly. That any bad purpoſe was made of them dont appear at all. He mentioned this to

ſhew there were a number of caſes, and there may be many more of perſons, who had taken them, and did not mean to make a bad uſe of them. What is the conſequence of your reverſing this judgment? There were perhaps many livings in the kingdom, which would be vacated: The king has a right to the preſentation *eo inſtante:* If upon every preſentation where a general bond of reſignation is given, the living is void, and the king has a right to preſent, the patron has incurred a penalty; the parſon has incurred a penalty; and yet they have gone according to what they thought was the law of the land. If ſuch bond are miſchievous, and are not to be encouraged, a bill may be brought in to rectify that practice. Can it be doubted or ſuſpected, that the parliament will not do it? One of the right reverend prelates ſaid, paſs a judgment, and then paſs a ſhort bill. What! paſs a judgment to do miſchief, and then bring in a bill to cure it? If that judgment was then overturned, the general opinion that has prevailed ſo long, upon caſes adjudged, whether adjudged right or wrong, it will overturn them all: And the rule he looked upon to be moſt applicable in this caſe was *ſtare deciſis*, that is, ſtand to deciſions where the ſetting them right would do much more miſchief than leaving them as they were.

Lord *Thurlow* obſerved, that the objection in *Jones* and *Lawrence* and *Babington* and *Wood* was *not*, that the bonds were given *previous* to the preſentation, but that it was not averred, that the bonds were given in *conſideration* of the preſentation: † *That* was the reaſon in *Birt* and *Manning* (*ſee page* 40.); the bond was to pay 300 l. as a contract to procure a preſentation to the living; it is probable one contract was made in conſideration of the other; yet, in point of pleading, it was neceſſary to ſhew *that* circumſtance, and to aver and prove it in evidence. In the caſe in *Lutwyche* of *Pyke* and *Pullen*, (*ſee page* 25.) the agreement was ſtated; but it was not averred, that one covenant was in conſideration of another.

The duke of *Richmond*.—His grace ſaid, that the caſe was ſo replete with learning of various kinds, that he was not capable of underſtanding the whole of it. He ſhould therefore ſpeak but a very few words.

One of their lordſhips ſaid, that the houſe were not bound by the deciſions of the judges in *Weſtminſter-hall*. They certainly were not bound by their deciſions, but

† This ſeems to me a great miſapprehension of the caſes. In both caſes the averment which the judges conceived to be neceſſary was of the fact that the bond was given in conſideration of the preſentation. That latter appeared ſufficiently from the condition of the bond as pleaded: nor was it argued, that any more was wanting for that purpoſe. The court was clear, that nothing the living under an agreement to reſign was a good conſideration.

their lordſhips were bound by the ſame rules as they were: Upon this point a great deal has been ſaid; and though policy and juſtice are ſeldom together, they ought always to be ſo. Though the caſe was *new* to their lordſhips, it then appeared that the deciſions have been for one hundred years unappealed from to their lordſhips, which was ſtrong evidence that their lordſhips were not totally at liberty to reverſe it, in like manner as if it was a caſe before them in the firſt inſtance. Some of their Lordſhips had ſaid that they looked upon the point as decided; if it was, he ſhould be one that would add to the weight of numbers; as it was a point of great conſequence, and there had been a great number of deciſions upon it in *Weſtminſter-hall*, which ſhew there had been an agreement of opinion; and ſuch deciſions had never been reverſed in that houſe; and therefore if they were wrong, and it ſhould be proper to ſet them all right, as the learned lord upon the wool-ſack obſerved, it ſhould be done by act of parliament. If he underſtood him right; in theſe deciſions, the caſes had properly come before the court in the ſame light as this caſe did come: If they were to reverſe this judgment, their deciſion would ſubject many perſons to penalties. He would ſtate to their lordſhips a fact: Some years ago, he had purchaſed an eſtate, for which he paid a very conſiderable ſum of money. He had the opinion of Mr. *Booth* and Mr. *Wilmot* upon the ſubject, as he had ſome doubts. He had a meſſage from both, that a deciſion had taken place in *Weſtminſter-hall* in the caſe of *Perrin* and *Blake*, which made his title not worth a farthing; and he was very ſorry for that opinion: The judgment of the *King's Bench* was reverſed by the *Exchequer Chamber*; a writ of error was brought to that houſe, but not proſecuted. He was told the caſe of *Coulſon* and *Coulſon* was never diſputed before that deciſion in the *King's Bench*; but then it was ſuppoſed an ill judged caſe. He thought then it was proper to wait for another judgment; the truth is, there is no ſuch thing as *certainty* in the law. He ſhould not give their lordſhips any more trouble, only give his opinion that they ought not to reverſe that judgment, becauſe it had been looked upon in *Weſtminſter-hall* as law above a century paſt, and if it was erroneous it may be altered by act of parliament.

See the caſes of Perrin and Blake, and Coulſon and Coulſon, in the Appendix.

The earl of *Mansfield* then ſaid, Is it your lordſhips' pleaſure that this judgment be affirmed?

A di-

A diviſion was demanded: For Lord *Thurlow*'s motion, that the judgment be reverſed, the number of lords was nineteen: For the earl of *Mansfield*, that the judgment be affirmed, the number was eighteen. Then it was ordered and adjudged, that the judgment given in the court of *King's Bench*, affirming a judgment given in the court of *Common Pleas*, be reverſed.

APPEN-

Appendix.

No. I.

Copy of the original Record, in the case of Sir *John Paschall*, v. *Clarke*, (See pages 16, 95, 102). *Trin.* 15 *Jac.* *Rolto.* 2051.

see ant. 95. 78. 102.

Essex ss.

JOHES epus *London* & *Johes Clarke* clicus sum fuerunt ad respondend *Johi Paskall* executori testamenti *Johis Paskall* armigi de plito qd pmittant ipm psentare idoneam psonam ad vicariam ecclie de *Baddowe* magna que vacat & ad suam spectat donaconem, *&c.* Et unde idem *Johes Paskall* executor p *Robtum Paman* attorn suu dic qd cum quidam *Johes Broke* fuit seit de & in rcoria de *Baddowe* magna cum ptin in com pdco ad quam advocaco vicarie ecclie pdce tunc ptinuit in dinco suo ut de feodo & sic inde seit existen idem *Johes Broke* quinto decimo die *Maii* anno regni dne *Elizabeth* nup regine *Anglice* quinto apud *Baddowe* magnam pdcam p quandam indentur suam cujus altam partem sigillo ejusdem *Johes Broke* signat idem *Johes Paskall* executor hic in cur pfert cujus dat est eisdem die & anno dimisit pfat *Johi Paskall*, testatori omes & omiod decimas granor & blador quorcunq annuatim pvenien renovan crescen debit inciden spectan sive aliquo modo ptinen rcorie de *Baddowe* magna pdca ac totum ill clausu pasture cum ptin continen p estimaconem duas acr & dimid sive majus sive minus jacen & existen in *Baddowe* magna pdca ac eciam advocaconem patronagiu & disposiconem pdce ecclie de *Baddowe* magna pdca hend & tenend edem *Johi Paskal* testatori executorib & assign suis a festo sci *Michis* archi

This is the record of the case reported in Noy 22.

Note, that the pleadings do not mention bond of resignation. The issue appears to have been on a corrupt agreement to present for money. Probably what is in Noy is, as there stated a mere dictum of the court upon evidence & it doth not follow that the evidence given to support the plea of corrupt agreement was a bond of resignation. The manner of the report rather imports, that it was a mere casual dictum during the trial.

archi tunc px ſequen uſq finem & tmiu mille annor extunc px ſequen & plenar complend virtute cujus dimiſſionis idem *Johes Paſkall* teſtator fuit de pdca advocacone vicarie ecclie pdce poſſeſſinat & ſic inde poſſeſſionat exiſten idem *Johes Paſkall* teſtator poſtea ſcilt quinto decimo die *Januarii* anno regni dce nup regine viceſimo tcio apud *Baddowe* magnam pdcam condidit teſtamentu & ultimam voluntatem ſua in ſcriptis & p idem teſtm ſuu conſtituit & ordinavit ipm *Johem Paſkall* modo quer & quandam *Mariam*, tunc uxorem ejuſdem *Johis Paſkall*, teſtatoris fore executores teſtamenti ſui pdci. Et poſtea ibm de tli ſtatu ſuo obiit inde poſſeſſionat poſt cujus mortem iidem *Johes Paſkall* modo quer & *Maria* onus execuconis teſtamenti pdci ſup ſe ſuſceperunt et ut executores teſtamenti illius fuerunt de pdca advocacone vicarie ecclie pdce poſſeſſionat. Et ſic inde poſſeſſionat exiſten pdca *Maria* poſtea ſcilt viceſimo die *Marcii* anno regni dce nup regine *Elizabeth* triceſimo octavo apud *Baddowe* magnam pdcam de tli ſtatu ſuo obiit inde poſſeſſionat. Et idem *Johes Paſkall* modo quer ipam ſupvixit & fuit de pdca advocacone vicarie ecclie pdce ſolus poſſeſſionat & ſic inde poſſeſſionat exiſten idem *Johes Paſkall* modo quer poſtea ſcilt quarto decimo die *Aprilis* anno dein millimo quingentiſimo nonageſimo ſexto apud *Baddowe* magnam pdcam p quoddam ſcriptu ſuu ſigillo ſuo ſigillat gerenq dat eiſdem die & anno conceſſit quibdam *Alexo Paſkall* genoſo & *Andree Paſkall* tunc genoſo poſtea militi primam & px advocaconem donaconem & libam diſpoſiconem vicarie ecclie pdce cum primo & px ex tunc vacare continget p unica vice tantum virtute cujus conceſſionis iidem *Alex* & *Andreas* fuerunt de pdca advocacone vicarie ecclie pdce p pdca prima & px vocacone ejuſdem poſſeſſionat. Et ſic inde poſſeſſionat exiſten pdca vicaria ecclie pdce de vicario ejuſdem p mortem *Chriſtoferi Ampteforth* clici tunc ult incumbent ejuſdem vacavit que quidem vacaco vicarie eccle pdce fuit prima & px vacaco vicarie ecclie illius poſt pdcam conceſſionem ipius *Johis Paſkall* modo quer pfat *Alex Paſkall* & *Andree Paſkall* de pdca advocacone vicarie ecclie pdce in forma pdca fcam p quod idem *Alex* & *Andreas* ad pdcam vicariam ecclie pdce fic tunc vacan pſentaverunt quendan *Henr Veſſey* clicum ſuu qui ad pſentaconem eordu *Alexi* & *Andree* fuit admiſſus inſtitut & induct in eodem tempore pacis tempore dce nup regine *Elizabeth* pdcoq *Henr Veſſey* ſic vicarie ecclie pdce vicario & incumben exiſten ac eodem *Johe Paſkall* modo quer de pdca advocacone vicarie ecclie illius in forma pdca

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poſſeſſionat exiſten pdca vicaria ecclie pdce vacavit p mor-mat pdci *Henr Veſſey* & adhuc vacans exiſtit Et ea rone ad ipm *Johes Paſkall* modo quer idoneam pſonam ad vicariam ecclie pdce ſic vacan ad pſens ptinn pſentare Et pdic *Epus* & *Johes Clarke* ipm *Johes Paſkall* modo quer inde injuſte impediunt unde dic qd detiorat eſt et dampm het ad valenciam ducentar librar Et inde p duc ſectam *&c.* Et pfert hic in cur lras teſtamentar pdci *Johis Paſkall* teſtatoris p quas ſatis liquet cur hic ipm *Johem Paſkall* modo quer & pdcam *Mariam* modo defunct fore executores teſtamenti pdci. Et inde here adminiſtraconem, *&c.*

Et pdcus epus & *Johes Clarke* p *Johem Woodgate* attorn ſuu ven & defend vim & injur quando *&c* Et pdcus epus dic qd pdca vicaria ecclie de *Baddowe* magna eſt infra dioces ſuam *London* Et qd ipe nichil het nec here clam in vicaria ecclie illius nec in advocacone ejus dem niſi admiſſionem inſtituconem & deſtituconem vicarior vicarie illius ut ejuſdem vicarie ordinarius & ceta que ad ordinariu in hac parte ptinent Et hoc parat eſt verificare unde pet judm ſi pdcus *Johes Paſkall* abſq ſpic impediento in pſona ipius epi in hac parte aſſignand acconem ſuam pdcam vſus eum here debeat, *&c.* Et pdcus *Johes Clarke* dic qd ipe eſt vicarius vicarie ecclie pdce impſonat in eadem ex pſentacone dni regis nunc. Et dic qd pdcus *Johes Paſkall* modo quer acconem ſuam pdcam vſus eum here non debet quia dic qd p quendam actu in parliamto pdce nup regine *Elizabeth* apud *Weſtm* in *Com Midd* anno regn ſui triceſimo primo tent edit int alia inactitat fuit authoritate ejuſdem parliamenti qd ſi aliqua pſona vel pſone corpora politica ſive corporat ad aliquod tempus poſt finem quadraginta dies px poſt finem ejuſdem ſeſſionis parliamenti p ad aliqua pecunie ſuma munere dono pficuo ſive beneficio quocunq aut dirce aut indirce vel p ſui rone alicujus pmiſſionis agreamenti conceſſionis obligaconis convenconis ſive al aſſurancie de vel p aliqua ſuma pecunie munere dono pficuo ſive beneficio quocunq dirce aut indirce pſentarent vel conferrent *Anglice* collate aliquam pſonam alicui beneficio cum cura aiar dignitat prebend ſive pmocon eccleſiaſtice vel darent aut impenſarent *Anglice* beſtowe eadem p vel in reſpcm alicujus tlis corrupt cauſe ſeu conſideraconis qd tunc quelt tlis pſentaco collaco donaco & impenſaco *Anglice* beſtowing Et quelt admiſſio inſtituco inveſtura & induco ſupinde forent vacua fruſtrat & nullius effcus in lege ac qd licit foret ad &

pdea nup regina *Elizabeth* hered & ſucceſſorib ſuis pſentare conferre *Anglice* to collate unto vel dare ſuu impendere *Anglice* to beſtowe quelt tlia beneficia dignitat pbend & promoconem eccliaſticam p illo uno tempore ſeu turno tantumodo qdq omes & quelt pſona ſive pſone corpora politica & corporat que extunc deinceps darent vel capent aliquam tlem ſumam pecunie munus donu ſive beneficiu dirce aut indirce vel que capent vel facent aliquam tlem pmiſſionem conceſſionem obligaconem convenconem ſeu aliam aſſuranc forisfacent & pderent duplicem valorem pficui unius anni cujuſlibt tlis beneficii dignitat pbende & pmoconis eccliaſtice Et pſona corrupte capiens pcurans *Anglice* ſeeking ſive acceptans aliqd tle beneficiu dignitat prebend ſive pmoconem eccliaſtica ſupinde & extunc deinceps adjudicaretur diſhabilis pſona in lege ad hend & gaudend eadem beneficiu dignitat pbend ſive pmoconem eccleſiaſticam put Pendm actu int alia plenius apparet Et idem *Johes Clarke* ultius dic qd pdca vicaria ecclie de *Baddowe* magna pdca eſt & pdco tempore ediconis actus pdci fuit beneficiu cum cura aiar Et idem *Johes* ultius dic qd bene & vum eſt qd pdcus *Johes Broke* ſuit ſeit de recoria de *Baddowe* magna pdca cum ptin ad quod &c. in dinco ſuo ut de feodo Et ſic inde ſeit exiſten idem *Johes Broke* pdco quinto decimo die *Maii* anno regni dce nup regine *Elizabeth* quinto ſupdco p indenturam ſuam pdcam dimiſit pfat *Johi Paſkall* teſtatori omes & ſingula decimas granor & blador quorcunq annuatim pvenien renovan creſcen debit inciden ſpectan ſive aliquo modo ptinen dce rcorie de *Baddowe* magna pdca ac totu pdcum clauſu pature cum ptinen ac advocaconem patronagiu diſpoſiconem pdce vicarie ecclie de *Baddowe* magna pdca hend & tenend eidem *Johi Paſkall* teſtori executorib & aſſign ſuis a pdco feſto ſci *Michis* archi tunc px ſequen uſq finem & tmiu pdcor mille annor ex tunc px ſequen & plenar complend & finiend virtute cujus dimiſſionis idem *Johes Paſkall* teſtator fuit de pdca advocacone vicarie ecclie pdce poſſionat Et ſic inde poſſeſſionat exiſten idem *Johes Paſkall* teſtator poſtea ſcilt pdco quinto decimo die *Januarii* anno regni die nup regine *Elizabeth* viceſimo trio ſupdco apud *Baddowe* magnam pdcam condidit teſtament & ultimam volunt ſua in ſcriptis & pidm teſtu ſuu conſtituit & ordinavit pdm *Johem Paſkall*, modo quer et pdcam *Mariam* tunc uxem ejus fore executores teſtamenti ſui pdci Et poſtea ibm obiit de pdca advocacone vicarie ecclie pdca in forma pdca poſſeſſionat, poſt cujus

mortem

mortem pdci *Johes Paſkall* & *Maria* onus execuconis teſtimenti pdci ſup ſe ſuſceperunt Et ut executores teſtimenti ill fuerunt de advocacone vicarie ecclie pdci poſſeſſionat Ipiſq ſic inde poſſeſſionat exiſten pdca *Maria* poſtea ſcilt pdco viceſimo die *Marcii* anno regni die nup regine *Elizabeth* triceſimo octavo ſupdco apud *Baddowe* magnam pdcam detli ſtatu ſuo inde obiit poſſeſſionat Et pdcus *Johes Paſkall* modo quer ipam *Mariam* ſupvixit Et fuit de pdca advocacone vicarie ecclie pdce ſolus poſſeſſionat Et ſic inde poſſeſſionat exiſten idem *Johes Paſkall* poſtea ſcilt pdco quarto decimo die *Aprilis* anno Dni millimo quingenteſimo nonageſimo ſexto ſupdico p ſcriptu ſuu pdcm conceſſit pfat *Alexo* & *Andree Paſkall* pdcam primam & px advocaconem donaconem & diſpoſiconem vicarie ecclie pdce cum primo & px extunc vacare continget p pdca unica vice tant virtute cujus conceſſionis pdci *Alex* & *Andreas* fuerunt de pdca advocacone vicarie ecclie pdce p pdca prima & px vacacone ejuſdem poſſeſſionat modo & forma put pdcus *Johes Paſkall* modo quer p narracionem ſuam pdcam ſupius ſuppon Set idem *Johes Clarke* ultius dic qd pdcis *Alexo* & *Andree* ſic inde poſſeſſionat exiſten pdca vicario ecclie pdce de vicario ejuſdem p mortm pdci *Criſtoferi Ampteforth* clici tunc ult incumben ibm vacavit Et ſic vacan exiſten ac pdcis *Alexo* & *Andree* de pdca advocacone vicarie pdce in forma pdca poſſeſſionat exiſten poſt finem quadraginta dier px poſt finem pdce ſeſſionis parliament ipdci ſcilt tcio decimo die *Junii* anno regni dce nup regine *Elizabeth* triceſimo octavo apud *Baddowe* magnam pdcam *int pdcos* Alexum & Andream & *pfat* Henr. Veſſey *ſimoniace corrupt & contra formam ſtatuti pdci concordat & agreat fuit qd pdci* Alex & Andreas *tunc de advocacone vicarie ecclie pdce in forma pdca vacan poſſeſſionat exiſten p quadam pecunie ſuma p pfat* Henr. Veſſey *pdcis* Alexo & Andree *pmiſs & poſtea ſolut pdcm* Henr. Veſſey *ad vicariam ecclie pdce tunc vacan pſentarent* ſup quo p pformacone corrupt & ſimoniacor concordie & agreament pdcor pdci *Alex* & *Andreas* de advocacone vicarie ecclie pdce in forma pdca poſſeſſionat exiſten poſtea ſcilt quarto decimo die *Junii* anno regni die nup regina *Elizabeth* triceſimo octavo ad pdcam vicariam ecclie pdce tunc vacan pſentaverunt pfat *Henr. Veſſey* clicum ſuu qui ad eandem pſentaconem ipor *Alex. & Andree* fuit admiſſus inſtitut & induct in eadem tempore pacis tempore die nup regine *Elizabeth* quor prextu ac vigore ſtatut pdci pdca pſentaco pdci *Henr. Veſſey* ad vi-

cariam pdcam p pfat *Alexum* & *Andream* modo & forma pdcis fact ac pdca admiſſio & inſtituco pdce *Henr. Veſſey* ſupinde hit penitus vacuo fruſtrat & nullius effcus in lege fuerunt Et ea rone ad dcam nup reginam jure prerogative ſue regie idoneam pſonam ad vicariam ecclie pdce ſic vacan p illo uno turno vigore ſtatuti pdci ptinuit pſentare pdcaq nup regina poſtea & anteqm ipam aliquam idoneam pſonam ad vicariam ecclie pdce pſentaſſet ſcilt viceſimo quarto die *Marcii* anno regni ſui quadrageſimo quinto apud *Weſtm* pdcam obiit ſine hered de corpore ſuo exeun poſt cujus mortem regimen hujus regni *Angli* decend dno regi nunc ut conſanguin & hered die nup regine *Elizabeth* p quod idem dnus rex nunc regimen hujus regni *Anglie* ſup ſe ſuſcepit ac rex ejuſdem regni fuit & adhuc exiſtit rone cujus ad dcm dnum regem nunc idoneam pſonam ad vicariam pdcam ſic ut pfertur vacan ptinuit pſentare p quod idem dnus rex nunc ad vicariam pdcam ſic ut pfertur vacan pſentavit eundem *Johem Clarke* clicum ſuu quia ad pſentaconem ipius dni regis nunc fuit admiſſus inſtitut & inducł et in eadem tempore pacis tempore dci dni regis nunc ac vicarius vicarie ecclie pdce impſonat in eadem ex pdca pſentacone ipius dni regis nunc ante diem impeticonis bris originalis pdci *Johis Paſkall* fuit & adhuc exiſtit abſq hoc qd pdca vicaria ecclie pdce vacavit p mortem pdci *Henr. Veſſey* modo & forma p ut pdcus *Johes Paſkall* modo quer p narraconem ſuam pdcam ſupius ſuppon Et hoc parat eſt viſicare unde pet judm ſi pdcus *Johes* modo quer acconem ſuam pdcam vſus eum here debeat &c.

Et pdcus *Johes Paſkall* modo quer quoad pdcm plitm pdci epi ex quo idem epus nichil clam in vicaria ecclie pdce neq in advocacone ejuſdem niſi admiſſionem inſtituconem & deſtituconem vicarior ad eandem vicariam & ceta que ad ordinariu ptinent ut loci ordinarius pet judm vſus pfat epum & bre epo &c Id cons eſt qd pdcus *Johes Paſkall* modo quer recupet vſus pfat epum pſentaconem ſuam ad vicariam pdcam Et heat bre eidem epo qd non obſtan reclam ipius epi idoneam pſonam ad vicariam pdcam ad pſentaconem pdci *Johis Paſkall* modo quer admittat &c Et nichil de mia pdci epi quia ſe excuſat de ſpiali impedimento &c Set ceſſit inde execuco quo uſq pdcm plitm int ipm *Johem Paſkall* modo quer & pfat *Johem Clarke* tminetur &c Et quoad pdcm plitm pdci *Johis Clarke* ſupius in barr plitat idem *Johes Paſkall* modo quer dic qd ipe p aliqua in eodem plito preallegat ab accone ſua pdca vſus eundem *Johem Clark*

hend

hend pcludi non debet quia ut prius dic qd pdca vicaria ecclie pdce vacavit p mortem pdci *Henr. Vessey* modo & forma put ipe narraconem suam pdcam supius suppon Et hoc pet qd inquiratur p priam Et pdcus *Johes Clarke* filit, &c. Id prec est vic qd venire fac hic a die Sce Trinitatis, in tres septimanas xij, &c. p quos, &c. Et quia nec, &c. ad recogn, &c. quia tam, &c.

No. II.

Act *of Institution to the Benefice mentioned in the preceding Record. Extracted from the Registry of the* Consistory Court *of* London, Feb. 27, 1784.

Undecimo die Mensis Octobris *anno Dmi* 1616.

Johes Clarke presbyter artim magr p venerabilem virum mrm *Thoma Stewarde* legum doctore redendi patris dm *Johannis London* epi vicarin in spicalibus genalem & officialem principalem, &c. ad vicariam ppetuam ecclesiæ pochialis de *Baddowe* magna in com *Essexiæ* p pravitatem Simoniæ vacante ad putaconem illustrissimi in chro principis & dmni nri *Jacobi* Dei grat *Angliæ, Scotiæ, Franciæ,* & *Hiberniæ* regis, fidei defensoris, &c. veri & indubitati ipsius vicariæ perpetue (ut asseritur) pro hac vice proni admissus fuit ac in & de eadem cum suis juribus membris & in pertinentijs universis rite & canonice institutus et investus juribus & consuetudinibus epalibus ac eccliæ cathredalis divi *Pauli, London,* semper salvis, prestito prius p eum juramt non solum de agnoscendo regie matis supremitatem &c ac de canonicæ obedientia eidem reidendo, patri &c prestand deciper continue & psonaliter residendum eadem vicaria juxta juris exigentia verum etiam quod nulla Symoniaca conventione seu pravitate interveniente, &c. se ac & in eandem vicaria ppetua presentari procuravit sub scriptis prius p eum articulis convocation &c juxta statuta et canones, &c. et acceptata p eum cura animarum porchianorum ibm scriptum fuit archimo *Essexiæ* sue ejus officiale conjuntim et divim ad eum inducendum.

MARK HOLMAN,
Deputy Register.

No. III.

Note on a Paragraph in Page 66.

Mr. *Mansfield*, counsel for the plaintiff in error, in his argument at the bar of the house of lords, stated to their lordships the occasion of filing the bill in *Chancery*, alluded to in the above paragraph, namely, That the clerk of the defendant in error, when he applied for institution, had confessed he had executed a bond, in a large penalty, to resign the living at any time upon the request of his patron; that the bishop, for that reason, refused institution; that sometime afterwards Mr. *Ffytche* sent the bond, which *Eyre* had executed, to the bishop, CANCELLED, with an intimation, that as the impediment was thereby removed, he hoped the bishop would institute his clerk; that the bishop, conceiving the cancelling this bond was merely to destroy the evidence obtained of its existence, and that some other bond, of the same nature, had been, or would be executed by *Eyre*, informed Mr. *Ffytche* that if he would give his word and honour that no such other bond had been, or would be, executed by *Eyre*, he would immediately institute him; and repeatedly called upon Mr. *Ffytche* for an answer to that proposition; that Mr. *Ffytche* declined giving any answer; and having brought his *quare impedit*, and the bishop being advised no defence could be made at law without proof of the bond, the bill was filed, stating the whole circumstances, and charging the cancelling the bond for the reason above mentioned, and the execution of another bond, and praying a discovery whether such other bond did not then exist; that to this bill Mr. *Ffytche* demurred; but the demurrer, upon argument, was over-ruled, and he was compelled to answer; and in his answer he had *confessed* the first bond was cancelled with a view and design to destroy the evidence obtained of its execution; and that *Eyre* had executed to him, as patron, *another* bond to the same purport.

No. IV.

No. IV.

The Caſe of Coulſon *v.* Coulſon, *cited by Lord* Thurlow *and the Duke of* Richmond. *(See page* 163, 175.)

A caſe was ſent from the *Rolls*, wherein the queſtion was, Whether an eſtate-tail, or only an eſtate for life, paſſed by a will? And it was this. 2 Stran. 1125. Hil. 13 Geo. 2.

Robert Bromley deviſes to his grandſon *Robert Coulſon*, and his aſſigns for his life natural, the reverſion of lands expectant on the death of the deviſor's ſiſter, and from and after the determination of the eſtate for life of his ſaid grandſon, then to truſtees during the life of his grandſon to preſerve contingent remainders, and from and after the death of his grandſon, unto the heirs of his body lawfully begotten and to be begotten, with divers remainders over. What words paſs an eſtate-tail.

And upon the firſt argument the court was clear in opinion, that this was an eſtate-tail in the grandſon. The caſes cited to prove it an eſtate-tail were: 1 *Co. Shelley's* caſe. *Co. Litt.* 22. *b.* 319. *b. Cro. Eliz.* 525. 1 *Vent.* 214. *Trin.* 11 *Ann. rot.* 220. *Backhouſe* v. *Wells. Abr. Ca. Eq.* 184. *Mich.* 13 *Geo.* 1. *Goodright* v. *Pullen*, *ante* 729. and a caſe at the council board of *Wood* v. *Morris.*

E contra were cited: *Carter*, 170. 1 *Sid.* 81. *Salk.* 568, 224. 3 *Lev.* 437. *Carth.* 172. *Abr. Eq. Caſ.* 105, 390. 1 *Vent.* 231.

No. V.

The Caſe of Perrin *againſt* Blake, *cited by Lord* Thurlow *and the Duke of* Richmond. *(See page* 163, 175.)

Action of Treſpaſs. Special Verdict.

" *William Williams*, by his laſt will after giving portions " to his three daughters diſpoſes of his temporal eſtate " in manner following. It is my intent and meaning, " that none of my children ſhould ſell or diſpoſe of my eſtate, Deviſe to *J. W.* for life, remainder to truſtees during the life of *J. W.* re-

mainder to the heirs of the body of *J. W.* is an eſtate for life, there being words of reſtriction that *J. W.* ſhall not ſell for any longer than his own life, and the eſtate being devised *to that intent* But in *Cam. Scacc.* held to be an eſtate tail.
1 Black. Rep. 672—3 Faſt.
9 Geo. 3. K. B.

" eſtate, for longer term, than his life: And, *to that* " *intent*, I give, deviſe and bequeath, all the reſt and " reſidue of my eſtate, to my Son *John Williams*, and any " ſon my wife may be enſient of, at my death, for and " during the term of their natural lives; the remainder, " to my brother-in-law *Iſaac Gale*, and his heirs, for " and during the natural lives of my ſaid ſons, *John* " *Williams* and the ſaid infant; the remainder to the heirs " of the bodies of my ſaid ſons, *John Williams* and the ſaid " infant, lawfully begotten or be begotten; the remainder " to my daughters, for and during the term of their " natural lives, equally to be divided between them; the " remainder to my ſaid brother-in-law *Iſaac Gale*, during " the natural lives of my ſaid daughters reſpectively; the " remainder to the heirs of the bodies of my ſaid " daughters equally to be divided between them. And I " do declare it to be my will and pleaſure, that the ſhare " or part of any of my ſaid daughters that ſhall happen to " die, ſhall immediately veſt in the heirs of her body, in " manner aforeſaid."

William Williams died 4th *February* 1723, leaving iſſue one ſon named *John Williams*, and three daughters, *Bonnetta*, *Hannah*, and *Anne*, and his wife not enſient. *John Williams* ſuffered a recovery, and declared the uſes to himſelf and his heirs.

N. B. This was a caſe from *Jamaica*; and in fact, inſtead of a recovery, the ſuppoſed eſtate tail of *John Williams* was endeavoured to be barred, by a leaſe and releaſe inrolled, according to the local law of that country. It came on before a committee of the privy council, who directed a caſe to be ſtated, for the opinion of the court of *King's Bench*; who refuſed to receive it in that ſhape. And therefore, a feigned action was brought; and the caſe above ſtated was, by conſent, reſerved at the trial.

Reverſed in the *Exchequer Chamber*, 1ſt *February*, 1772, by the opinion of *Parker Chief Baron*, *Adams Baron*, *Gould Juſtice*, *Perrot Baron*, *Blackſtone Juſtice*, *Nares Juſtice*. *contra De Grey Chief Juſtice*, *Smythe Baron*.

It was argued in this, and *Trinity* term; the queſtion being merely this, whether *John Williams* took, by this will, an eſtate for life, or in tail. And in *Michaelmas* following, it was adjudged, by lord *Mansfield* chief juſtice, *Aſton* and *Willes* juſtices, that he took only an eſtate for life: *Yates* juſtice *contra*, that he took an eſtate tail. But I was not preſent, ſays juſtice *Blackſtone*, when the judgment of the court was delivered.

No. VI.

The case of White *and* White, *determined in the house of lords on 6th* May, 1782. *cited by the Bishop of* Bangor, *and Lord* Thurlow. (*See page* 134, 163.)

Richard White, having issue *Simon White*, his eldest son, and *Hamilton White* his second *son*, and a daughter, and no other issue, on 1st *January* 1775, made his last will and testament in writing, and devised the lands in question to his said son *Simon White* and the heirs of his body lawfully begotten; and for default of issue of his said son *Simon*, then he devised the premises to his said second son *Hamilton White* and the heirs male of his body lawfully begotten. And he devised *another* estate to the said *Hamilton White* and the heirs male of his body lawfully begotten, and for default of issue of the said *Hamilton White*, he devised the said last estate to his said eldest son *Simon White*, and the heirs male of his body lawfully begotten.

Simon White died on 2d *September* 1776, leaving issue *Richard White* his eldest son and heir at law, then under twenty-one, and three other sons and four daughters.

Richard White, the testator, died on 27th of the same *September*.

Hamilton White upon his father's death, entred into the premises claiming the same under his father's will.

In *Michaelmas* term 1779, *Richard White*, the testator's son, brought an ejectment in the court of *King's Bench* in *Ireland* for recovery of the premises against the said *Hamilton White*.

The cause was tried at *Cork* at the spring assizes in 1780, and the jury found a special verdict.

In *Michaelmas* term 1780, the special verdict was argued in the court of *King's Bench* in *Ireland*; and in *Hill.* term following, judgment was given for the plaintiff.

Hamilton White removed the cause, by writ of error, into the court of *King's Bench* in *England*; where, after two arguments, the judgment of the court of *King's Bench* in *Ireland* was *reversed*.

Upon this judgment of reversal *Richard White* brought a writ of error in parliament; and on the 6th of *May* 1782, it was ordered by the house of lords, that the judgment of the court of *King's Bench* in *England*, reversing the judgment of the court of *King's Bench* in *Ireland*, be affirmed.

The

The queſtion in this caſe was, whether upon the lapſed deviſe (*lapſed*, becauſe the deviſee, *Simon White*, died on the 2d *September*, 1776, *before* his father, *Richard White*, who died on the 27th of the ſame month) the eſtate ſhould go to the heir of the deviſee, namely, *Richard*, the ſon of *Simon*; or whether it ſhould not go over to the ſecond ſon, namely, to *Hamilton White*.

The following queſtion was put to the judges in the houſe of lords, namely, whether in the event that has happened the defendant *Hamilton White* took any and what eſtate in the lands in queſtion under the deviſe, for default of iſſue of *Simon White*?—The lord chief baron gave the unanimous opinion of the judges, that the defendant *Hamilton White* took an eſtate tail in the ſaid lands under the deviſe to him for default of iſſue of *Simon White*.

No. VII.

More copy from Cro. Cha. 330.

The caſe of Bawderok *v.* Mackaller, *more fully reported than it is in page* 13, 14.

Information upon the ſtatute 31 *Eliz.* of Simony for the king and himſelf, ſuppoſing the church in the tower of *London* to be a benefice with cure of annual value of 6l. 13s. 4d. grantable by the king, and that one *Such* was parſon, and reſigned; And that afterwards the defendant agreed with *J. S.* to give him twenty pounds, if he might procure him to be preſented thereto by the king, and admitted and inducted; And alleges *in facto*, that he procured the king to give unto him the ſaid preſentation to the ſaid chapel; and that he was admitted, inſtituted, and inducted thereto; and therefore he demanded 6l. 13s. 4d. being the double value, *ſecundum formam ſtatuti &c.* upon not guilty pleaded, and found for the plaintiff, *Henden* ſerjeant moved in arreſt of judgment, firſt, that this information is not good, becauſe he ſhews the annual value to be 6l. 13s. 4d. and the ſtatute is, that he ſhall forfeit a double value, and yet demands 6l. 13s. 4d. as being the double value, whereas it appears, it is not, and therefore it is ill. *Sed non allocatur:* for the truth of the offence being ſhewn, and found againſt him, although he demands leſs than he ought, yet the information is good for the king. And it was compared to the caſe of *Agard* againſt *Candiſh*, which was adjudged in the *Exchequer*, where an information

formation was brought for him and the king upon the ſtatute of liveries, and it was brought after the year, which is not good for the party, by the expreſs words of the ſtatute, yet it was good for the king, and judgment entered. Secondly, it was moved, that this being a donative of the king's donation, is not within the ſtatute of 31 *Eliz.* for that mentions only where one comes in by Simony, by preſentation, or collation, *&c.* *Sed non allocatur:* Becauſe it is within an equal miſchief, againſt which the ſtatute provides, and ſo within the remedy thereof. Thirdly, it was objected, that this could not be within the ſtatute, becauſe, the king being donor, it cannot be intended, that he preſented by Simony; and the ſtatute is, that the patron ſhall loſe his preſentation for that time, and the king is to have it; therefore it ſhall not extend to any of the king's donations, *ſed non allocatur:* For Simony may be by compact betwixt ſtrangers, without the privity of the incumbent or patron, and yet within the purview of the ſtatute: As it was adjudged in *Calver*'s caſe in the *Exchequer*, as *Jones* cited it, where the father of the incumbent contracted with the patron's wife, to give her one hundred pounds if the patron would preſent his ſon, the patron or incumbent not knowing of this contract (as it was found by a ſpecial verdict) yet this was held to be within the ſtatute. So here he giving to a ſtranger 26l, *&c.* is within the ſtatute: Whereupon rule was given, that judgment ſhould be entred for the plantiff.

No. VIII.

A fuller report of the caſe of Mackaller *v.* Toderick, *(ſee page* 4, 9.*) cited by Lord Chief Baron Skinner (ſee page* 118.*) and by Earl Mansfield. (See page* 171.*)*

This a mere copy from Cro. Cha. 337. 353. & 361.

Error of a judgment in the court of the tower of *London*, in *aſſumpſit*, where the plaintiff declared, that the defendant promiſed him, in conſideration that he would procure the ſaid *Mackaller* to be preſented and inſtituted to the chapel of the tower, being a donative in the king's gift, *&c.* to pay unto him twenty pounds upon requeſt. The plaintiff allegeth in *facto*, that by his labour and means the king preſented the ſaid *Mackaller* to the ſaid chapel, and he was admitted, inſtituted, and inducted into it; and that he required the payment of the ſaid twenty pounds at ſuch a day, *&c.* and the de- Mich. 9 Car. 1.

fendant had not paid it. The defendant pleaded *non assumpsit*, and verdict and judgment for the plaintiff. And now error brought, the error assigned, that judgment was given for the plaintiff, where it ought to be for the defendant: And now *Fletcher* for the plaintiff in the writ of error moved, that this judgment was erroneous, because he declares upon a promise grounded on a consideration against law; and that being the only consideration, the *assumpsit* is void; and for that relied upon the case of *Oneley*, 19 *Eliz. Dy.* and *Cok. lib.* 3. *fol.* 82.

Hil. 9 Car. 1. *et adjournatur.*——It was now moved by *Gybbs* for the defendant in the writ of error, that the consideration is good; for it is for his solicitation and labour in procuring him to be presented, which in itself is no Simony, nor cause to avoid the contract: And admitting it were Simony, yet not being an offence at the common law, nor triable by course of the common law, (but an offence only made by the canons) it was not punishable at the common law until the statute of 31 *Eliz.* And therefore in *Mich.* 40 and 41 *Eliz.* in the *Common Bench*, it was adjudged, that where an obligation was for the payment of money, and the defendant pleaded it to be made for the performance of a simoniacal contract, and shews how; upon demurrer it was adjudged, that it was merely a spiritual offence, whereof the common law did not take any cognisance, and therefore, was no plea to avoid the bond. And in 8 *Jac.* betwixt *Taverner* and *Smith* in an information upon the statute of 31 *Eliz.* it was resolved, that he ought to suppose a corrupt contract, and not a simoniacal contract: And the statute doth not make the obligation and contract for Simony to be void, as the statute of 13 *Eliz.* of usury, and the statute of 23 *Hen.* 6. for sheriffs. *Fletcher* to the contrary, for Simony hath always, by the law of God and of the land, been accounted a great offence: And an *assumpsit* or bond, with a condition to pay a sum of money for a simoniacal contract, is accounted against law, and void; as if one should promise another ten pounds to beat such a man, it is void, 2 *H.* 4. 9. An obligation with a condition to save harmless concerning imbezzling of a writ, and not returning thereof, is void, because against law. *Richardson* said, he much doubted thereof, because the promise is, to pay so much for his labour and travail, and not for the presentation. *Et adjournatur.*——

Pasch. 10 Car. 1. And now the court was of opinion, that the consideration was illegal, and that the action lies not; for the consideration to have money, to procure him to be

rector of the church, is a ſimoniacal contract, and an unlawful act, condemned by all laws. *Vide* 2 *Hen.* 4. 9. *Coke, lib.* 10. *fol.* 99. *Bewſage*'s caſe, and 19 *Eliz. Dy.* 355. *Oneley*'s caſe, 2 *Hen.* 5. 10. And where it was alleged, that Simony is ſuch a ſpiritual thing, and ſuch an offence whereof the common law takes not any notice, at leaſtwiſe did not before the ſtatute 13 *Eliz.* That was denied. Secondly, it was held, that this declaration is not good; for the promiſe is to pay him, after that he is rector; and he ſhews that he was rector by his procurement upon this promiſe, which cannot be; for he never was rector, but a parſon utterly diſabled to be a parſon by this ſimoniacal contract, as in 23 *Eliz.* for not reading of articles, and the caſe in *Cok. Lit. Vernon*'s caſe, for the buying of offices; whereupon it was held to be error, and the judgment was reverſed.

No. IX.

Oaths of Simony from biſhop Gibſon's Codex, *page* 802.

Ann. 1138 in the council of *Weſtminſt. Cum inveſtituram aliquis per epiſcopum acceperit, precipimus, ut ſuper evangelium* juret, *ſe nihil propter hoc, vel per ſe, vel per aliquam aliam perſonam, dediſſe alicui, vel promiſiſſe.* Spel. vol. 2. p. 39.

Ann. 1222. In the council of *Oxford*, the oath is, *quod propter preſentationem illam nec promiſerit, nec dederit aliquid preſentanti, nec aliquam propter hoc inierit pactionem.* Conſt. Step: de jurejurando C. *præſenti.*

Ann. 1236. Among the conſtitutions of S. *Edmund* archbiſhop, one is, againſt the reſervation of *penſions* out of benefices; for which miſchief, and all others of the like nature, the following remedy is provided: *Nos ut melius obviemus talibus morbis, Præſentantis & præſentati recipimus juramentum, quod nec promiſſio nec pactio illicita intervenerit.* Spel. vol. 2. p. 205.

Ann. 1391. In archbiſhop *Courtney*'s decree againſt *chop-churches*, the oath preſcribed is, *quod propter earum* [perſonarum] *præſentationem non dederunt, nec promiſerunt, directe vel indirecte, per ſe vel ſubmiſſas perſonas aliquid præſentantibus, vel aliis perſonis quibuſcunque; quodque obligati non ſunt, nec eorum amici pro ſe, juratoria aut pecuniaria cautione, de ipſis beneficiis reſignandis vel permutandis, nec aliquem illicitum in ea parte contractum, factum vel promiſſum, de ipſorum voluntate & ſcientia, ſunt ſortiti.* Ibid. 643: Regiſtr. Morton, 225. b.

Ann.

Ref. Leg. f. 33. b. [See p. 119.]

Ann. 1551, or 1552. (5, or 6 *Edw.* 6.) in the chapter of the *Reformatio Legum*, which is entitled *forma juramenti miniſtrorum*, the oath is; *ſe nec antea dediſſe quicquam, nec poſtea daturum, aut de dando pactum interceſſiſſe, vel interceſſurum, vel ipſo authore, vel alioquocunque procuratore, aut vicario, reſpectu præſentis ſacerdotii quod jam ſumit: Et ſi quiſquam illum celans, hoc in genere quicquam molitus eſt, ſe, quam primum norit, epiſcopo renunciaturum, & ejus arbitrio ceſſurum parto ſacerdocio.*

Thus far Biſhop *Gibſon.*

See p. 2. for the Engliſh oath ag.t Simony.

Note, The form of the oath againſt Simony in *Ireland* is the ſame with that in *England*; but the following words are added to the former: "And for the better expreſſing "of this curſed abuſe, we ordain and appoint, "that if any clerk, or any other with his conſent, ſhall "ſeal any bond or bill to any perſon or perſons, with "condition of reſignation of his benefice, whereto he is "to be or hath been preſented; or ſhall make, or "covenant to make, any leaſe of the profits of the ſaid "benefice, or any part thereof, unto the patron or any "belonging to him, or any other perſons to his or their "uſe, to continue during his incumbency, or for above "three years, or with ratable diminution of the rent "under the true value; he ſhall be holden convict of "Simony, and proceeded againſt according to the ſeverity "of the ancient canons in that behalf."

The *Engliſh* canons were made in 1603. (*ſee page* 2.) and the *Iriſh* in 1634. ſo that the framers of the *Iriſh* eccleſiaſtical conſtitutions profited much by the experience of a few years.

FINIS.

of it there could not have been found two opinions as concerning such bonds. — On the one side, as my mind feels upon the subject, they are contrary to the principle by which all official patronage should be regulated, whether lay or ecclesiastical; contrary to the independency of the parson, contrary to the provision of law by which the law is given to the parson as against the patron, by making the former tenant for life removable only by his ordinary for misbehavior; contrary to the general canon law against simony; contrary to our own particular ecclesiastical constitutions against it; contrary to both the words & spirit of the statutory provisions against it in the 5th of Elizabeth. But then on the other side there were many considerations to be considered in favor of such bonds; cases in number varying, slightly reported indeed, but whilst the statute of Elizabeth was recent; cases seem to have been slightly argued. There was the unsuccessful result of the agitation made against bonds of resignation by bishop Stillingfleet in the latter end of the last century, which instead of obtaining a condemnation of them was followed with such a series of cases along ... acquiescence in their validity, that

on the question. There was a [subsequent] ~~case in which~~ series of cases, in ~~equity, in which~~ which [the] of our courts of equity interposed to prevent ~~the~~ the abuse of [these] ~~such~~ bonds, but in such a way as to [afford] ~~give new force to them~~ ~~in point of law~~ [seemingly] to admit their legal effect [on the strength of all this]. Lastly there was an universal practice of such bonds, ~~even amongst persons of a rea~~ so ~~that~~ as to make it impossible to condemn them as illegal & simoniacal, without [pass[ing] censure on] ~~endangering~~ an infinite number of living ~~persons~~ persons, who, acting upon the [such] ~~authority of the~~ cases ~~determined~~ & ~~an opinion~~ [sanction given to such bonds] authoritative acknowledgment of ~~the legality of such bonds~~ ~~long acquiescence in them~~ [their legality], ~~have~~ ~~been~~ ~~their legality~~ & such long acquiescence in ~~the~~ ~~such~~ them, may be reasonably presumed to have ~~practice~~ given or received them with very innocent intentions. — With ~~so~~ ~~much~~ [many weighty] difficulties ~~attending~~ ~~in the way of argument~~ ~~each opinion~~ ~~to be so~~ ~~opposed to each opinion~~ upon the subject, I wonder not [with] weighty considerations arising upon either view of this great ecclesiastical question, I wonder not, that there should have been a diversity of ~~opp~~ opinion amongst the most ~~impartially inclined to form~~ persons anxious to ~~decide~~ ~~impartially~~ ~~with~~ decide according to the law of the country. — See the case of the